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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19

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JAMES ELLENBECKER, in his capacity of Secretary of the South Dakota Department of Social Services, TERRY WALTER, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement,
Petitioners,

v.

VELDA HOWE, THERESA TAKEN ALIVE, on behalf of themselves, their children, and all others similarly situated,
Respondents.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

WHETHER TITLE IV-D OF THE SOCIAL SECURITY ACT [42 U.S.C. § 651 et. seq.] CONFERS STANDING AND CREATES PRIVATE ENFORCEABLE RIGHTS THEREBY ALLOWING INDIVIDUAL LITIGANTS TO COMMENCE AND MAINTAIN § 1983 CIVIL RIGHTS LAWSUITS AGAINST STATE AND FEDERAL OFFICIALS FOR ALLEGED VIOLATIONS OF THE ACT'S NUMEROUS STATUTORY AND REGULATORY PROVISIONS?

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Petitioners James Ellenbecker and Terry Walter respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on October 13, 1993.

## OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is not yet published, but is printed in the Appendix at A-1 through A-23. The opinion and order of the district court appears at 774 F. Supp 1224 (D.S.D. 1991), and also appears in the Appendix at A-26 through A-75. A memorandum order issued by the district court on March 27, 1992, granting plaintiffs relief, appears in the Appendix at A-76 through A-86. A subsequent memorandum order issued by the district court on August 10, 1992, granting plaintiffs further relief, appears in the Appendix at A-87 through A-105.

## JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit Court of Appeals was entered on October 13, 1993. A-24 through A-25. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

42 U.S.C. § 651 et. seq. (1988) - Title IV-D of the Social Security Act [the Child Support and Establishment of Paternity Act] - Appendix at A-106 through A-269.

## STATEMENT OF THE CASE

This case has national significance for each of the 54 participating states and territories which operate a Child Support and Establishment of Paternity program under Title IV-D of the Social Security Act. See, 42 U.S.C. § 651 et. seq. (1988). The sole issue presented is whether Title IV-D creates private enforceable rights thereby allowing private litigants such as Respondents herein to commence § 1983 civil rights lawsuits against state and federal officials for alleged violations of Title IV-D's numerous statutory and regulatory child support provisions. If upheld, the Eighth Circuit

Court of Appeals' decision will allow countless § 1983 lawsuits seeking private enforcement of Title IV-D, even though the 54 participating states and territories are in total and complete compliance with all statutory and regulatory requirements as established by Congress and the Federal Secretary.

**1. Statutory Background**

The State of South Dakota is a participant in the Federal Aid to Families with Dependent Children (AFDC) program established under Title IV-A of the Social Security Act. 42 U.S.C. § 601 et. seq. The AFDC program was created by the Social Security Act of 1935 to provide monetary payments to poor families deprived of support due to a parent's absence, death, or incapacity. 42 U.S.C. § 601 et. seq. States are not required to participate in the AFDC

program. Instead, participation is totally voluntary. Any state which chooses to participate in the AFDC program under Title IV-A must operate a program which meets any and all federal requirements and standards. One such requirement is that each state participating in the AFDC program under Title IV-A must also operate a separate child support enforcement program under Title IV-D of the Social Security Act. 42 U.S.C. § 651 et. seq. The sanction for failure to operate a child support enforcement program in compliance with all Title IV-D requirements is reduction or total elimination of federal IV-A (AFDC) payments.

As part of its child support enforcement responsibilities under Title IV-D, each participating state must provide parent locator services; establish child support obligations; enforce support obligations; and,

establish paternity, in accordance with numerous federal regulations and requirements. See, 42 U.S.C. § 654(4). A few of the Title IV-D requirements which each participating state must meet by way of appropriate laws, regulations, or procedures include, among other things, the establishment of paternity until the age of 18 [42 U.S.C. § 666(a)(5)(A)(i)]; the use of genetic testing in paternity cases [42 U.S.C. § 666(a)(5)(B)]; requiring absent parents to post bond or other security to insure prompt payment of support obligations [42 U.S.C. § 666(a)(6)]; imposing liens on real or personal property [42 U.S.C. § 666(a)(4)]; withholding child support arrearages from income tax returns [42 U.S.C. § 666(a)(3)]; reporting child support arrearages to credit reporting agencies [42 U.S.C. § 666(a)(7)]; establishment of uniform child support guidelines [45 C.F.R. § 302.56];

use of immediate income withholding to collect current and past-due support obligations [42 U.S.C. § 666(a)(8) & § 666(b)]; periodic review and modification of child support obligations [45 C.F.R. § 303.4(c)]; and, securing and enforcing medical support obligations [45 C.F.R. § 303.31].

Each participating state is also statutorily required to comply with any and all federal directives which the Secretary determines to be necessary in order to assure the effectiveness of the Title IV-D program. 42 U.S.C. § 652(a)(1); 42 U.S.C. § 654(14). All Title IV-D services complying with federal requirements must be provided to both AFDC and non-AFDC recipients alike. 42 U.S.C. § 654(6).

Each state is also required to submit for the Secretary's approval a state plan. Each state plan must meet all Title IV-D requirements and implementing regulations. A

state plan must also "provide for entering into cooperative arrangements with appropriate courts and law enforcement officials" to assist the state in meeting its obligations under Title IV-D. 42 U.S.C. § 654(7). Any such cooperative arrangements must "specify that the parties will comply with Title IV-D of the Act, implementing Federal regulations and any other applicable Federal regulations and requirements." 42 U.S.C. § 654.

The Secretary is responsible for reviewing and ultimately approving each state plan. Upon approval of its plan, a state is entitled to payment by the Secretary of a substantial portion of its costs in providing child support enforcement services under Title IV-D. 42 U.S.C. § 655. Disapproval of a state's plan may result in total termination of federal funding and federal financial participation. 45 C.F.R. § 301.13(d). Child

support enforcement services provided by states which do not meet Title IV-D requirements are not entitled to federal financial participation.

Title IV-D also contains a very comprehensive and complex internal remedial scheme which exists between each participating state and the federal government. In addition to continual review and approval of required state plans, the Secretary is also required to conduct extensive, triennial audits of each state's IV-D child support enforcement program. 45 C.F.R. § 305.10. The purpose of the audit is to insure that each participating state is operating its Title IV-D program in "substantial compliance" with all federal requirements. "Substantial compliance" is defined as providing required IV-D support enforcement services in at least 75% of audited cases. 45 C.F.R. § 305.20.

As part of the audit process, and to insure participating states are operating effective and efficient support enforcement programs which substantially comply with all federal requirements, the Secretary has established no less than 56 audit criteria. Each state must have written procedures for, and substantially comply with, each of these specified criteria. 45 C.F.R. § 305.20(a)(1); 45 C.F.R. § 305.20 (a)(2). If the Secretary determines that a state is not in substantial compliance with all federal requirements and audit criteria, the Secretary provides the state written notice of each unmet criteria. The Secretary also establishes the amount of the penalty, which penalty is mandatory once the conditions of the penalty statute are met. 42 U.S.C. § 603(h)(1).

Any penalty imposed by the Secretary for noncompliance may be suspended for a period

not to exceed one year so long as the state submits a corrective action plan within 60 days of the penalty notice. 45 C.F.R. § 305.99. A corrective action plan must be approved by the Secretary and must contain the steps necessary to achieve substantial compliance with all IV-D requirements. 42 U.S.C. § 603 (h)(2)(A)(i). Only one corrective action period is available for each of the 56 audit criteria. 42 U.S.C. § 603(h)(1). There is no administrative appeal of the Secretary's decision to disapprove a states' corrective action plan. 45 C.F.R. § 305.99(e). If the Secretary determines that implementation of the corrective action plan will achieve substantial compliance, and monitoring of the plan establishes that it is being fully implemented and the state is progressing towards substantial compliance, the loss of IV-A (AFDC) funds will be suspended for a

period not to exceed one year. 42 U.S.C. §§ 603 (h)(2)(A)(ii) & (iii) & 603(h)(2)(B).

Any penalty imposed remains in effect until the Secretary issues a finding of substantial compliance. During this time, the Secretary monitors not only implementation of the corrective action plan, but also monitors and audits all other aspects of the states' IV-D program for each year that the penalty remains in effect. 42 U.S.C. § 652(a)(4). The monetary sanction is suspended until the Secretary finds that either: (1) the state is not implementing its corrective action plan; or (2) despite implementation of the plan, the state did not achieve substantial compliance, based upon a follow-up audit. 45 C.F.R. § 305.99. The Secretary's finding of continued noncompliance after a follow-up audit results in imposition of the monetary sanctions against the state, subject to an

administrative appeal to the Departmental Grant Appeals Board, and subsequent judicial review. 42 U.S.C. § 1316. Each audit takes an average of 21 months to complete. 54 Fed. Reg. 4841 (1989). This lengthy time frame establishes the comprehensiveness of the Secretary's audit process.

**B. Factual Background**

Respondent Velda Howe is an enrolled member of the Crow Creek Sioux Indian Tribe. The Crow Creek Indian Reservation is one of the nine Indian reservations located within South Dakota. Respondent Theresa Taken Alive is an enrolled member of the Standing Rock Sioux Indian Tribe, another Indian reservation located within South Dakota. Louis Sullivan is the former Secretary of the Department of Health and Human Services. Petitioner James Ellenbecker is the Secretary of the South Dakota Department of Social Services, and

Petitioner Terry Walter is the Program Administrator for the South Dakota Office of Child Support Enforcement (OCSE), a sub-agency of the Department of Social Services. In their official capacities, Ellenbecker and Walter are primarily responsible for administering South Dakota's Child Support Enforcement and Paternity Establishment Program in accordance with the requirements of Title IV-D of the Social Security Act.

The Federal Secretary, in conjunction with the Department of Health and Human Services, have promulgated and developed very specific policies and procedures to assist states in their handling of child support enforcement cases involving Native American Indians. In all cases wherein the Native American absent parent lives, works, or has assets/income off the reservation, and the state can properly exercise jurisdiction over

the same, each state is required to provide the full range of child support enforcement services as mandated by Title IV-D. States are not required to pursue child support enforcement activities involving Native American Indians residing within reservation boundaries, however, if no means exist for the state to obtain jurisdiction over the Indian absent parent, his income, or his assets.

The Federal Defendant also encourages states to enter into cooperative agreements with appropriate tribal officials wherein the respective tribal entity would consent to, and allow, a state to pursue Indian absent parents residing within reservation boundaries for purposes of child support enforcement services. Any cooperative agreements negotiated with an Indian tribe, and any support enforcement services provided

thereunder, must meet all Title IV-D requirements.

The Federal Secretary has developed these policies because of an express recognition that Indian tribes are semi-sovereign entities, and states do not possess either civil or criminal jurisdiction over Indian parents residing within reservation boundaries. These policies, as with all Title IV-D requirements, are binding upon participating states in operation of their Title IV-D child support enforcement program. See, 42 U.S.C. § 652(a)(1); 42 U.S.C. § 654(14).

The State of South Dakota does not have cooperative agreements with any of its nine Indian tribes which would allow state officials to pursue Native American Indians residing within reservation boundaries for child support enforcement activities. No

Indian tribe located within South Dakota has expressed any willingness or desire to enter into any such cooperative agreement with the state; no Indian tribe has consented to the State of South Dakota's pursuit of thousands of Indian absent parents residing within reservation boundaries for purposes of child support enforcement; and, no Indian tribe located within South Dakota has established, or expressed any willingness to establish, the necessary laws and procedures as required by Title IV-D of the Social Security Act.

Despite these jurisdictional barriers and obstacles, South Dakota, through the Office of Child Support Enforcement (OCSE), provides valuable and necessary child support enforcement services to literally thousands upon thousands of Indian parents, and their children, each and every year. It is only when the State of South Dakota cannot obtain

jurisdiction over the Indian absent parent, his income, or his assets, that support enforcement services cannot be provided under Title IV-D. Even in these instances, however, the South Dakota Office of Child Support Enforcement attempts to pursue Indian parents for child support collection and paternity establishment, until such time that the matter is either dismissed or cannot be pursued further because jurisdictional barriers and obstacles.

In its most recent triennial audit conducted in 1989, the Federal Secretary, in conjunction with the Federal Office of Child Support Enforcement, determined that South Dakota was in total and complete compliance with all federal requirements and federal policies in the state's handling of child support enforcement cases involving Native American Indians. South Dakota has never been

sanctioned or cited by the Federal Secretary for not providing appropriate Title IV-D support enforcement services to its Native American Indian residents. South Dakota also has in effect the federally required Title IV-D state plan, which state plan has received continuous approval from the Federal Secretary.

In March of 1987, Theresa Taken Alive applied to the South Dakota Department of Social Services seeking child support enforcement assistance. Specifically, Taken Alive requested that OCSE enforce her tribal court divorce decree. This tribal decree required her former husband to pay $300 per month for the support of the parties' minor daughter, Caroline. The absent parent from whom which she sought child support, however, was a Native American Indian residing within reservation boundaries.

In June of 1989, Velda Howe applied to the Department of Social Services requesting child support enforcement assistance. Specifically, Howe requested that OCSE establish paternity on behalf of her minor son, Daniel Howe. The putative father named by Howe was also a Native American Indian who resided within the boundaries of the Rosebud Sioux Indian Reservation. Because the absent parents in both of these cases were Native American Indians residing within reservation boundaries, OCSE advised both Howe and Appellee Taken Alive that it could not provide the requested services since OCSE could not obtain requisite jurisdiction over either of the Indian absent parents for purposes of child support enforcement.

Howe and Taken Alive then commenced this action in federal district court alleging that both the Federal Secretary, in conjunction

with State Defendants Ellenbecker and Walter, were violating the statutory provisions of Title IV-D by not providing the requested child support enforcement services. Howe and Taken Alive further alleged that they were being denied Title IV-D support enforcement services on the basis of their race, in violation of the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. The district court subsequently certified the matter as a class action lawsuit.

Petitioners Ellenbecker and Walter repeatedly requested the district court below to dismiss this case. In support of their numerous dismissal motions, Petitioners asserted that Title IV-D did not confer standing upon Howe and Taken Alive, and did not create private enforceable rights entitled

to § 1983 protection. The district court denied all dismissal motions.

Following trial on the merits, the district court entered its decision and order wherein it determined that the Federal Secretary and Petitioners Ellenbecker and Walter were in violation of Title IV-D by not providing child support enforcement services to Native American Indians residing within reservation boundaries. Howe v. Ellenbecker, 774 F.Supp. 1224, 1233-34 (D.S.D. 1991) (A-26 through A-75). The district court entered this decision even though none of the nine Indian tribes had consented to such enforcement activity by state officials within reservation boundaries, and even though none of the respective tribal laws conformed to the mandatory Title IV-D requirements.

On August 10, 1992, the district court entered a subsequent memorandum order

directing Petitioners Ellenbecker and Walter, with the assistance of the Federal Secretary, to use "reasonable efforts" in an attempt to negotiate cooperative agreements with each of the nine Indian tribes located within the state. (A-87 through A-105). Regarding the State Defendants' renewed argument that the case must be dismissed because Title IV-D does not create either standing or private enforceable rights, the district court merely stated that this is "a matter for the parties and the appellate court to consider on appeal." (A-103 through A-105). Ellenbecker and Walter then timely appealed to the Eighth Circuit Court of Appeals seeking to overturn the district court's determination that Title IV-D creates private enforceable rights thereby allowing Howe and Taken Alive to commence and maintain their § 1983 claims. On October 13, 1993, the Eighth Circuit Court of

Appeals issued its decision and judgment affirming the district court below. Howe v. Ellenbecker, No. 92-3354 (8th Cir. Oct. 13, 1993) (A-1 through A-25).

**REASONS FOR GRANTING THE WRIT**

1. THE EIGHTH CIRCUIT COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION IN WEHUNT V. LEDBETTER, 875 F.2d 1558 (11th Cir. 1989), cert. denied, 494 U.S. 1027 (1990).

In its decision below, the Eighth Circuit Court of Appeals determined that Title IV-D of the Social Security Act creates private enforceable rights thereby allowing individual litigants to commence and maintain § 1983[1]

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[1] 42 U.S.C. § 1983 provides in pertinent part: "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,

lawsuits against state and federal officials for alleged violations of the Act's numerous statutory and regulatory provisions. In reaching its decision, the Eighth Circuit concluded (1) that Congress enacted Title IV-D to order to benefit individuals such as the plaintiffs herein; (2) that Title IV-D gives "unambiguous notice" to participating states of what is expected of it; and, (3) that Title IV-D's internal, comprehensive remedial scheme is not sufficient to foreclose private enforcement of the Act's numerous statutory and regulatory provisions. Howe v. Ellenbecker, supra at 6-10. The Eight Circuit's decision in this matter directly conflicts with the Eleventh Circuit Court of

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or immunities, secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Appeals' decision in Wehunt v. Ledbetter, 875 F.2d 1558 (11th Cir. 1989), cert. denied, 494 U.S. 1027 (1990).[2] The Eighth Circuit's decision also directly conflicts with the majority of decisions rendered by federal district courts which have examined this precise issue.

In Wehunt v. Ledbetter, 875 F.2d at 1558, a custodial mother and AFDC recipient commenced a class action lawsuit against the State of Georgia and the Federal Secretary for

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[2] As indicated above, the Eleventh Circuit Court of Appeals in Wehunt v. Ledbetter, 875 F.2d at 1558, determined that Title IV-D did not create private enforceable rights. This Court subsequently denied certiorari in that case. Since the Eighth Circuit has now reached a completely opposite conclusion regarding this precise issue, this Court should now grant certiorari to ultimately resolve this conflict, not only for the benefit of the 54 states and territories participating in Title IV-D, but also for the benefit of the millions of Title IV-D child support recipients nationwide.

alleged violations of Title IV-D. The plaintiffs in Wehunt, as in this case, sought federal court intervention to require state and federal officials to properly administer and enforce the statutory and regulatory provisions of Title IV-D. The district court dismissed the action finding that Congress had foreclosed private enforcement of Title IV-D, and further finding that Title IV-D created no implied right of action in favor of private litigants. Wehunt v. Ledbetter, 875 F.2d at 1562-63.

The Eleventh Circuit Court of Appeals affirmed the district court's dismissal of the § 1983 claim. In doing so, the Eleventh Circuit carefully examined the comprehensive, self-regulatory scheme of Title IV-D, along with the congressional and legislative history surrounding the Act, and reasoned as follows:

> We find that Title IV-D was not enacted to confer a private cause of action on the appellant or any other person similarly situated. Where a federal statute provides its own comprehensive enforcement scheme, as here, the requirements of that enforcement procedure may not be by passed by bringing suit directly. A ruling to the contrary would open the doors for multitudinous suits to be decided by federal courts. It is not the function of the judiciary to direct the Secretary in the fulfillment of his role as overseer of the IV-D program. Such could not have been the intent of Congress. Wehunt v. Ledbetter, 875 F.2d at 1568-69.

The Eleventh Circuit also correctly recognized that:

> Carried to its logical end, [appellants'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the power of the purse; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful government action. A federal court is not the proper forum to press general

> complaints about the way in which the government goes about its business. Wehunt v. Ledbetter, 875 F.2d at 1568 quoting Allen v. Wright, 468 U.S. 737, 750 (1984).

Similarly, in Carelli v. Howser, 923 F.2d 1208 (6th Cir. 1991), the Sixth Circuit Court of Appeals ordered dismissal of a § 1983 lawsuit seeking private enforcement of Title IV-D's numerous statutory and regulatory provisions. Although the Sixth Circuit Court of Appeals did not totally foreclose the possibility of such lawsuits in all situations, the Sixth Circuit did determine that dismissal was required because of the comprehensive remedial scheme found within Title IV-D itself.

> We conclude that the nature of the relief sought by plaintiffs here would cause a federal court to carry out an oversight function beyond that intended by Congress, given the comprehensiveness of the remedial scheme provided in the statute.

Carelli v. Howser, 923 F.2d at 1214.[3]

The majority of federal district courts which have also considered this issue have determined that Title IV-D does not create private enforceable rights. In Mason v. Bradley, 789 F. Supp. 273 (N.D. Ill. 1992), an AFDC recipient commenced a § 1983 action against the State of Illinois for its alleged failure to comply with the child support enforcement requirements of Title IV-D. Relying upon this Court's decision in Suter v.

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[3] Both the Eleventh Circuit Court of Appeals in Wehunt v. Ledbetter, supra, and the Sixth Circuit Court of Appeals in Carelli v. Howser, supra, explicitly recognized that the comprehensive remedial scheme found within Title IV-D foreclosed private enforcement of the Act by way of § 1983 claims. In its decision below, however, the Eighth Circuit Court of Appeals reached a totally opposite conclusion and determined that Title IV-D's comprehensive remedial scheme was not sufficient to preclude § 1983 lawsuits against state and federal officials.

Artist M., 503 U.S. _____, 112 S.Ct. 1360 (1992) [hereinafter cited as Suter], the district court dismissed the action specifically finding that Title IV-D did not create private enforceable rights.[4] In reaching this conclusion, the district court recognized that Title IV-D did not provide participating states "unambiguous notice" of particular, mandatory obligations as required by this Court in Suter, supra. The district court also recognized that Title IV-D does not require total and complete compliance by participating states in every case. Instead, "the regulations specify that only "substantial compliance," defined as 75 percent compliance in federally audited cases,

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[4] This Court's decision in Suter, 112 S.Ct. at 1366, and its importance in considering the merits of this petition, are discussed in detail in section 2 infra.

is required." Mason v. Bradley, 789 Supp. at 277 citing 45 C.F.R. § 305.20. In view of these factors, the district court concluded that Congress did not intend to create either an express or implied right of action under Title IV-D, and also did not intend to create rights entitled to protection under the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

Similarly, in Oliphant v. Bradley, 91 C. 3055 (N.D. Ill. Feb. 19, 1992), another federal district court determined that Title IV-D does not create private enforceable rights entitled to protection by way of § 1983 claims. In reaching this conclusion, the district court succinctly stated:

> These regulations demonstrate that Congress has not intended to place any affirmative obligations on states from which enforceable rights can be inferred. First, states are not obligated to participate in the AFDC program at all. Secondly,

> even if a state elects to participate, nothing in Title IV-D places a binding obligation on the states to provide ... child support enforcement services for every AFDC applicant. Had Congress intended to mandate compliance with the time frames set out in the regulations, it would have conditioned receipt of federal funds on total, rather than substantial compliance. Since we find that Congress has not clearly conditioned the receipt of federal funds on states' provision of effective child support enforcement services for all AFDC applicants, Oliphant cannot claim that Title IV-D provides her with a private, enforceable right. Oliphant v. Bradley, supra at 16-17.

The district court also correctly reasoned that:

> [E]ven if we were to assume that the "substantial compliance" standard does not preclude private enforcement actions under § 1983, the statute's express provisions of detailed responsibilities for the Secretary illustrates Congress' intent to foreclose private remedies. A broad statutory remedial scheme, in conjunction with the flexible standard of state compliance, strongly suggests that Congress did not wish state plans to

> be challenged in private suits. Allowing such actions would inundate the courts with complaints from every parent not completely satisfied with the child support services being provided to them. Oliphant v. Bradley, supra at 18-19.[5]

The Eighth Circuit Court of Appeals below incorrectly decided that Title IV-D creates private enforceable rights entitled to due process protection by way of § 1983 claims. This decision directly conflicts with the

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[5] See also, Clifton v. Schafer, 969 F.2d 278 (7th Cir. 1992), wherein the Seventh Circuit Court of Appeals determined that Title IV-A of the Social Security Act does not create private enforceable rights. "If any such rights are created, it is only the right to require participating states to have in effect the federally required state plan." And, for purposes of this petition, it is undisputed that the State of South Dakota has maintained the federally required state plan pursuant to federal statutes and regulations at all material times, which state plan has received continuous and on-going approval from the Federal Secretary.

Eleventh Circuit Court of Appeals' decision in Wehunt v. Ledbetter, supra, and also conflicts with the majority of federal district courts which have considered this precise issue. This Court should grant certiorari in order to resolve this conflict, and also to insure uniform and consistent application of Title IV-D on a nationwide basis.

2. THE EIGHTH CIRCUIT COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S PRIOR DECISION IN SUTER V. ARTIST M., 503 U.S. ____, 112 S.Ct. 1360 (1992).

In Suter, 112 S.Ct. at 1360, this Court determined that the "reasonable efforts" language of the Adoption Assistance and Child Welfare Act[6] did not create private enforceable rights entitled to § 1983 due process protection. In reaching this

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[6] See, 42 U.S.C. § 671(a)(15).

conclusion, this Court recognized that Congress enacted the Adoption Assistance Act pursuant to its spending powers. As such, before a private right of action can be found to exist, a state must be in a position to knowingly and voluntarily accept the conditions imposed upon it, and Congress must clearly and "unambiguously" create such a right. Suter, 112 S.Ct. at 1366-67. This Court also recognized that as a condition of eligibility for federal funding, participating states are required to have an approved state plan which meets all congressional and federal requirements. Suter, 112 S.Ct. at 1367-68. Finally, in deciding that the Adoption Assistance Act did not create private enforceable rights entitled to § 1983 protection, this Court recognized that the Adoption Assistance Act already contained a very comprehensive remedial scheme whereby the

federal government could reduce or totally eliminate federal funding to states for substantial failure in their administration of the Act, or their failure to comply with applicable federal regulations, mandates, and directives. Suter, 112 S.Ct. at 1368-69.

Each of the pivotal factors considered by this Court in Suter when it refused to create private enforceable rights under the Adoption Assistance Act are also found within Title IV-D of the Social Security Act. As with the Adoption Assistance Act, Congress enacted Title IV-D pursuant to its spending powers. See, 42 U.S.C. § 652 et. seq. In doing so, Congress did not "clearly and unambiguously" create private enforceable rights entitled to due process protection by way of § 1983 claims. The 75% substantial compliance standard, coupled with Title IV-D's broad statutory remedial scheme, strongly suggest

that Congress did not intend to create private enforceable rights. See, Oliphant v. Bradley, supra at 18-19. Moreover, Title IV-D's broad statutory remedial scheme is even more comprehensive than that considered by this Court in Suter when it refused to find or create private enforceable rights within the Adoption Assistance Act.[7]

Within its opinion below, the Eighth Circuit correctly recognized that following this Court's decision in Suter, a federal statute must give "unambiguous notice" to a state of what is expected of it before a § 1983 claim is appropriate." Howe v.

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[7] See, Statutory Background, supra. See also, 45 C.F.R. § 301 et. seq. [state plan requirements]; 45 C.F.R. § 305.10 et seq. [federal audits]; 45 C.F.R. § 305.20 et seq. [audit criteria]; 45 C.F.R. § 301.13, § 305.100 [penalty provisions]; 45 C.F.R. § 305.99 [corrective action plans].

Ellenbecker, supra. at 9-10. The appellate court totally ignored the 75% compliance standard found within Title IV-D, however, when it created private enforceable rights under the Act.[8] The Eighth Circuit also failed to properly consider that the State of South Dakota is in total and complete compliance with all federal requirements, directives, and regulations in its handling of child support enforcement cases involving

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[8] As indicated previously, Title IV-D establishes a 75% compliance standard for participating states. See, 45 C.F.R. § 305.20. If the Act also creates private enforceable rights as determined by the Eighth Circuit below, every state will be required to meet all Title IV-D requirements in 75% of its IV-D caseload from a federal regulatory standpoint, but will then face § 1983 lawsuits in the remaining 25% of its caseload for non-compliance with Title IV-D requirements. Such a result clearly was not intended by Congress, and surely does not provide "unambiguous notice" to a state of what is expected of it for federal funding eligibility as required by this Court in Suter.

Native American Indians. If in fact the State of South Dakota, or any other participating state, had known that it could be subjected to countless § 1983 lawsuits for alleged violations of Title IV-D, even though it was meeting all statutory requirements and federal directives, it may well have opted out of Title IV-D participation entirely. See e.g., Suter, 112 S.Ct. at 1366, quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) [A state cannot knowingly and voluntarily accept federal funds if it is unaware of the conditions imposed upon it or if it is unable to ascertain what is expected of it.] Moreover, the Eighth Circuit failed to properly consider the significance of the comprehensive remedial scheme contained within Title IV-D, which remedial scheme "leaves no room for additional private remedies under § 1983." See e.g., Middlesex County Sewerage

Authority v. National Sea Clammers Association, 453 U.S. 1 (1981); Smith v. Robinson, 468 U.S. 992 (1984).

This Court recently determined in Suter that Congress did not intend to create private enforceable rights under the Adoption Assistance Act. A similar conclusion regarding Title IV-D of the Social Security Act is required, despite the Eighth Circuit's ruling to the contrary.[9]

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[9] As shown by the conflicting decisions cited within this petition, this Court's decision in Suter has created considerable confusion and dissension amongst federal courts nationwide. Some courts interpret Suter as a decision which "weakens earlier precedent in vital respects." See e.g., Stowell v. Ives, 976 F.2d 65, 68 (1st Cir. 1992); Howe v. Ellenbecker, supra. at 7 n. 6. Other courts interpret Suter as completely overruling this Court's prior analytical framework and precedent. See e.g., Suter, 112 S.Ct. at 1377 (Blackmun, J., dissenting) [the Court's decision in Suter contravenes 22 years of precedent and changes the rules of the game with no justification]. Since every federal statute "must be interpreted by its own

3. THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION INVOLVING THE INTERPRETATION OF FEDERAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT.

Whether Title IV-D of the Social Security Act creates private enforceable rights is clearly a federal issue which has nationwide significance and importance. As previously stated, 54 states and territories currently participate in the Child Support and Paternity Establishment Program under Title IV-D. The State of South Dakota alone currently handles in excess of 25,000 open, active child support enforcement cases. These include paternity establishment cases; cases to establish a child support obligation; and, cases to enforce a child support obligation. The

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terms", Suter, 112 S.Ct. at 1367 n. 8, this Court should grant certiorari not only to resolve this pivotal issue as it relates to Title IV-D, but also to provide further guidance and clarification to assist lower courts in interpreting other federal statutes.

nationwide IV-D caseload amongst participating states and territories was 12,796,388 active cases at the conclusion of fiscal year 1990, and this number is steadily and rapidly increasing. Fifteenth Annual Report to Congress, OCSE, U.S. Department of Health Human Services - FFY 1990.

If in fact Congress intended to create private enforceable rights under Title IV-D as determined by the Eighth Circuit Court of Appeals below, every participating state and territory will face virtually thousands upon thousands of § 1983 civil rights lawsuits for alleged violations of the Act. This will be true even though the participating states and territories are in total compliance with all federal regulations, requirements, and directives. It cannot be overly emphasized that:

> Allowing such actions would inundate the courts with complaints from every parent not completely satisfied with the child support services being provided to them. Oliphant v. Bradley, supra at 19.

Moreover,

> A ruling to the contrary would open the door for multitudinous suits to be decided by federal court adjudication. Wehunt v. Ledbetter, 875 F. 2d at 1567.

If Title IV-D creates private enforceable rights, the federal judiciary will also be required to supervise state and federal officials in their attempts to provide paternity establishment and child support enforcement services to millions upon millions of needy families within the family law arena, which clearly is an area of law traditionally relegated to the states, and the state court systems. See, Cort v. Ash, 422 U.S. 66, 78 (1975) [one of the primary factors to be

considered in determining the existence of "private rights" under federal statutes is whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states].

The Federal Secretary, in conjunction with the Department of Health and Human Services, has established very stringent policies and procedures which all participating states must follow in providing Title IV-D child support enforcement services. The Federal Secretary has also developed specific policies which participating states must follow in their handling of their Native American IV-D caseload. The Secretary did so because of an express recognition that Indian tribes are semi-sovereign entities, and states do not have jurisdiction over Native American Indians residing within reservation boundaries for purposes of child support enforcement

activities. See e.g., Fischer v. District Court, 424 U.S. 382 (1976) [Indian tribes have inherent authority to regulate domestic relations issues amongst members residing within reservation boundaries]. And, this Court should give substantial deference to an agency's interpretation of a statute which the agency administers, and should not substitute its judgment for a reasonable interpretation of that agency. See e.g., Young v. Community Nutrition Institute, 476 U.S. 974 (1986).

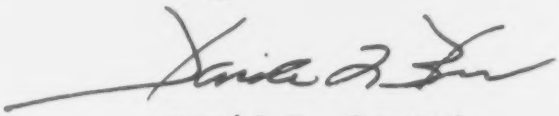
> It is not the function of the judiciary to direct the Secretary in the fulfillment of his role as overseer of the IV-D program. Such could not have been the intent of Congress. Wehunt v. Ledbetter, 875 F.2d at 1568-69.

## CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
93 1288 JAN 11 1994
OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

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JAMES ELLENBECKER, in his capacity of Secretary of the South Dakota Department of Social Services, TERRY WALTER, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement,
Petitioners,

v.

VELDA HOWE, THERESA TAKEN ALIVE, on behalf of themselves, their children, and all others similarly situated,
Respondents.

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# APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 92-3354

VELDA HOWE, on behalf of themselves, their children, and all other similarly situated; THERESA TAKEN ALIVE, on behalf of themselves, their children and all others similarly situated,

Plaintiffs - Appellees,

vs.

JAMES ELLENBECKER, in his capacity as Secretary of the South Dakota Department of Social Services; TERRY WALTER, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement;

Defendants - Appellants,

LOUIS W. SULLIVAN, in his capacity as Secretary of the United States Department of Health and Human Services,

Defendant.

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Appeal from the United States District Court
for the District of South Dakota

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Submitted: June 16, 1993
Filed: October 13, 1993

Before RICHARD S. ARNOLD, Chief Judge, JOHN R. GIBSON and MORRIS SHEPPARD ARNOLD, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

James Ellenbecker, Secretary of the South Dakota Department of Social Services, Terry Walter, Program Administrator of the South Dakota Office of Child Support Enforcement, and Donna Shalala, Secretary of the United States Department of Health and Human Services,[1] appeal from a declaratory judgment entered in favor of a class represented by Velda Howe and Theresa Taken Alive,[2]

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[1] Donna E. Shalala replaced Louis W. Sullivan, M.D., as the Secretary of Health and Human Services on January 22, 1993. The Secretary of Health and Human Services, who was a defendant in the proceedings in the district court, originally appealed the district court's order, but subsequently voluntarily dismissed his appeal.

[2] Howe and Taken Alive bring this action on behalf of themselves, their children, custodial parents, and children who have

recognizing their rights to enforce claims for child support enforcement services under Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq. (1988). The district court ordered the federal government and the State to negotiate with the Indian tribes, of which Howe and Taken Alive were enrolled members, in an attempt to reach a cooperative agreement concerning enforcement of child support obligations to their children. The State argues that Howe and Taken Alive have no standing and no private enforcement right under Title IV-D which they may assert in an

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absent parents residing on Indian reservations in South Dakota, and all others similarly situated, claiming that they have been denied child support collection services secured under Title IV-D of the Social Security Act, the Child Support and Establishment of Paternity Act, 42 U.S.C. § 651 et seq. (1988). This matter was certified as a class action by order filed October 24, 1990.

action under 42 U.S.C. § 1983 (1988). We affirm the judgment of the district court.[3]

Howe is an enrolled member of the Crow Creek Sioux Indian Tribe and lives with her four children in Chamberlain, South Dakota. She receives Aid to Families with Dependent Children (AFDC) benefits for herself and her minor son. As a condition of receiving AFDC, she was required to cooperate with the State in establishing her child's paternity, securing child support for her children, and assign the right to receive the child support for her son to the State. She claims that despite her willingness to cooperate with the State and identify her son's father, the State made no effort to establish the paternity of

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[3] The Honorable Donald J. Porter, United States District Judge for the District of South Dakota.

her son because the putative father lives on a South Dakota Indian reservation.

Taken Alive receives AFDC benefits for her minor daughter. She has custody pursuant to a judgment and decree of divorce from the Standing Rock Sioux Tribal Court, which required the father to pay child support in the amount of $300.00 per month to Taken Alive. Taken Alive claims that although she informed the South Dakota Office of Child Support Enforcement of the divorce decree, the OCSE has refused to attempt to collect child support because the father lives on a South Dakota Indian reservation.

The district court describes the AFDC program as a "federal-state cooperative effort administered by the states." Howe v. Ellenbecker, 774 F. Supp. 1224, 1226 (D.S.D. 1991). Under the program, states make monetary payments to financially needy

families, including children deprived of parental support. 42 U.S.C. § 601 et seq. Although state participation in the program is not required, if a state enters the program, it must operate its plan in compliance with the statutory requirements and regulations promulgated by the Secretary of Health and Human Services. The Act requires every participating state to have a plan in effect for child support collection which meets the Act's minimum standards, 42 U.S.C. § et seq.

Since 1950, the federal government has continued to revise the requirements governing efforts by states to enforce child support. In 1984, Congress enacted an amendment requiring states to pass laws for mandatory wage withholding and liens, as well as requiring paternity establishment services for both AFDC and non-AFDC families. See Child Support Enforcement Amendments of 1984, Pub.

L. No. 98-378, codified at 42 U.S.C. § 651 et seq. (1988). Shortly thereafter, Congress passed the Deficit Reduction Act of 1984 which provided that when a non-custodial parent of an AFDC child makes a support payment to the state pursuant to a Title IV-D plan, the AFDC family receives the first fifty dollars collected without any reduction in the amount of assistance they receive under the plan each month. Pub. L. No. 98-369, codified at 42 U.S.C. § 657(b)(1) (1985). If a state fails to comply with any of the Title IV-D child support enforcement regulations, it risks losing federal matching funds.

South Dakota follows differing approaches to child support enforcement depending on whether or not the absent parent lives within an Indian reservation. In cases where the absent parent does not live on an Indian reservation, upon receiving an application

from a parent requesting collection assistance, the South Dakota Office of Child Support Enforcement first attempts to locate the absent parent. The OCSE then sends a notice of support debt to the absent parent requesting financial data so that the OCSE can determine the amount owed. The OCSE next attempts to obtain a stipulation from the absent parent admitting paternity and agreeing to pay the amount owed. Finally, if the absent parent refuses to stipulate to paternity or the amount owed, the OCSE turns the case over to counsel who attempts to obtain paternity determinations and support orders through the state courts.

If the absent parent lives and works on the reservation, the OCSE attempts to locate the absent parent and seeks a stipulation of paternity and the amount owed. However, because the state courts lack jurisdiction

over parents residing on the reservations, the State cannot pursue these parents through the state courts. The State has had little success in its efforts to enforce state court orders on the reservations because of jurisdictional barriers. Moreover, the State does not use tribal courts to pursue the absent parents, in part, because the federal government will not provide matching funds for pursuing child support claims through the tribal courts. Each of the nine tribes located in South Dakota operates a tribal court system having jurisdiction over tribal members, and the State may use them to bring paternity and child support actions.

The district court rejected the arguments of the federal and state governments that Title IV-D does not afford individuals a private right of action under section 1983, and that they do not have standing to bring

this action. The court found that the Secretary's interpretation that Title IV-D precluded federal financial assistance to states which pursue absent parents who reside and work on Indian reservations when the tribe does not comply with the Title IV-D regulations was unreasonable. The district court concluded that the State could provide enforcement services through contractual agreements with attorneys, and that the State could use tribal courts to pursue absent parents without contradicting the regulations. The court reasoned that in enacting Title IV-D, Congress did not intend to permit exclusion of a large percentage of Indian children from its benefits, and accordingly, that the State must provide them with the services they are entitled to receive.

The court ordered the federal government to attempt to negotiate with the tribes in South Dakota a tribal plan which would be statutory, regulatory, as well as functionally equivalent of a state plan as described in Title IV-D. The court concluded that the state and federal governments should reach every effort to negotiate a cooperative agreement with each of the nine tribes.[5] The parties do not attack the extent of the

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[5] Upon a Motion for Reconsideration and Request for Stay Pending Reconsideration by the federal government, the district court vacated its earlier order requiring both the federal and state governments to negotiate, and ordered the State to "use every reasonable effort to negotiate a cooperative agreement or purchase of service agreement with each of the nine tribes in South Dakota." Howe v. Ellenbecker, 796 F. Supp. 1276, 1280 (D.S.D. 1992).

remedy, and accordingly, we need not discuss the remedy in detail.

The only issue on appeal is the propriety of the district court's determination that Howe and the class have standing, and that they have a private enforceable right to sue under 42 U.S.C. § 1983. We review this ruling under a de novo standard.

In order to have standing in federal court, plaintiffs must show that they have suffered or are about to suffer a "personal injury" that is "fairly traceable" to the defendant's conduct, and that the injury is "likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984). Because standing is determined by the specific claims presented, International Primate Protection League v. Administrators of Tulane Educ. Fund, ____ U.S. ____, 111 S. Ct. 1700, 1704 (1991) (quoting Allen v. Wright,

468 U.S. 737, 752 (1984)), whether Howe and the class have standing depends on whether the statute at issue, Title IV-D, creates an express or implied private right of action. Warth v. Seldin, 442 U.S. 490, 500-01 (1975). Here, the injury the class suffers, specifically denial of child support enforcement services, is directly traceable to the State's refusal to assist them in obtaining child support enforcement from the absent fathers living within Indian reservations and is capable of judicial redress. Therefore, their standing depends on whether Title IV-D confers a private right of action under section 1983 upon parties in their position.

As a general rule, plaintiffs may bring private causes of action under section 1983 for violations of federal statutes. Maine v.

Thiboutot, 448 U.S. 1, 8 (1980). However, a private right of action will not lie if Congress has not created any enforceable rights in the statute, Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 24-25 (1981), or if it intended to foreclose private enforcement by providing a comprehensive remedial scheme in the statute itself, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14 (1981). Recently, in Suter v. Artist M., 112 S. Ct. 1360 (1992), the Supreme Court refined its analysis of private rights of action under section 1983, concluding that a section 1983 action is created where Congress intends the statute to benefit persons like the plaintiffs through the imposition of mandatory and direct obligations on the state, and where no comprehensive enforcement mechanism exists

under which plaintiffs may find relief.[6] Id.

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[6] Before Suter, the Supreme Court developed a three-part framework for analyzing whether a plaintiff could enforce a federal law by bringing a § 1983 action. See Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509 (1990). This inquiry examined (1) whether Congress intended the provision at issue to benefit the putative plaintiff, and if so, (2)whether it reflected merely a congressional preference or imposed binding obligations on a state or (3) whether the plaintiff's interest was so "vague and amorphous" that it is beyond the power of judicial enforcement. Id.

This Circuit, as well as others, has recognized that although Suter weakened earlier precedent in vital respects, the Court was careful not to explicitly overrule the Wilder framework. See Arkansas Medical Soc'y, Inc. v. Reynolds, Nos. 92-3146/93-2352, slip op. at 8-9 (8th Cir. Sept. 10, 1993) ("Suter did not overrule Wilder"); Stowell v. Ives, 976 F.2d 65, 68 (1st Cir. 1992); Procopio v. Johnson, 994 F.2d 325, 311 N.9 (7th Cir. 1993). Following the lead of the First and Seventh Circuits, we believe it "both prudent and possible to synthesize the teachings of Suter with the Court's prior precedents." Stowell, 976 F.2d at 68. Thus, we proceed by using the Wilder framework as articulated in Suter. however, we need not discuss in detail whether Howe and the class have "vague and amphorous" interests that are beyond the power of judicial enforcement because neither party disputes that the interests of obtaining child

at 1366-68 & n.11.

Our analysis for evaluating a federal law's enforceability under section 1983 begins by inquiring "whether the provision in question was intended to benefit the putative plaintiff." Wilder, 496 U.S. at 509. We agree with the district court that in enacting Title IV-D Congress intended to benefit AFDC families. First, Congress expressly provided in 42 U.S.C. § 651 that the purpose of Title IV-D is to "assur[e] that assistance in obtaining support will be available. . . to all children." Second, Congress' intent to benefit AFDC women and children with absent fathers is evident from the plain language of Title IV-D's requirements. For example, to meet the Act's minimum standards, a state

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support are capable of redress through judicial decree.

must, inter alia: make Title IV-D services available to non-AFDC families, 42 U.S.C. § 657(c); give the first fifty dollars collected from each absent parent to the family without a corresponding reduction in their monthly AFDC payment, 42 U.S.C. § 657 (b); and provide families with annual notice of support collected on their behalf, 42 U.S.C. § 654(5). Third, the legislative history sows that Title IV-D was primarily designed to "help children attain this right [to support], including the right to have their fathers identified so that support can be obtained." S. Rep. No. 93-1356, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 8133, 8145-46. Finally, the decisions of other courts are consistent with our view that Title IV-D was intended to benefit needy families. See Carelli v. Howser, 923 F.2d 1208, 1211 (6th Cir. 1991) (Title IV-D was intended to benefit both AFDC

families and "the public fisc" by reducing public welfare); Behunin v. Jefferson County Dep't of Social Servs., 744 F. Supp. 255, 257-58 (D. Colo. 1990) (Congress primarily intended Title IV-D to secure support enforcement services for children and their families); Beasley v. Harris, 671 F. Supp. 911, 921 (D. Conn. 1987) (Congress intended to enlarge the assistance to the family); cf. Wehunt v. Ledbetter, 875 F.2d 1558, 1565 (11th Cir. 1989), Cert. Denied, 494 U.S. 1027 (1990) (Title IV-D was enacted to reduce welfare costs). We thus conclude that Congress enacted Title IV-D to benefit "putative plaintiffs" such as Howe and the class members.

Next, we must determine whether Congress set forth the intent to benefit these types of families in specific and mandatory terms in the provision at issue. Suter, 112 S. Ct. at

1370. To assert a section 1983 action, the statute at issue must give unambiguous notice to the State of what is expected of it, instead of "broad limits" in which to comply. Suter, 112 S. Ct. at 1368; Arkansas Medical Soc'y, slip op. at 9 (discussing the Suter Court's emphasis on the fact that terms must be "unambiguously" conferred to be enforceable). Once a state decides to enter the AFDC program, the requirements of Title IV-D and its corresponding regulations are mandatory and unambiguous. For example, in addition to the mandatory requirements stated above, state plans "must provide that the State will undertake" a program to establish the paternity of a child born out of wedlock, 42 U.S.C. § 654(4), and the state "must" notify a family "at least annually" of the amount of child support collected on its behalf. 42 U.S.C. § 654(5). See Behunin, 744

F. Supp. at 258 (listing reasons Title IV-D is mandatory). A state may not receive federal funds for its AFDC program unless it has a Title IV-D child support recovery program that complies with federal law. 42 U.S.C. § 602(a)(27). Furthermore, the regulations reiterate the statute's plain directives, requiring that participating states must attempt to locate absent parents, 45 C.F.R. § 303.3(b); must periodically review and adjust child support orders, 45 C.F.R. § 303.4; must determine the paternity of children born out of wedlock, 45 C.F.R. § 303.5; and must enforce support obligations for the children, 45 C.F.R. § 303.6. The mandates of Title IV-D are particular and specific enough to impose binding obligations on South Dakota, and accordingly, create substantive enforceable rights in the class. See Wilder, 496 U.S. at 512 (holding that the Boren Amendment of the

Medicaid Act creates substantive federal rights enforceable under section 1983 because the Act actually required the states to adopt "reasonable and adequate rates" for medical assistance); cf. Suter, 112 S. Ct. at 1370 (holding that the Adoption Assistance and Child Welfare Act of 1980 does not create a private enforceable right under section 1983 because Act only required states to make "reasonable efforts").

Finally, even though the class falls within the parameters of intended beneficiaries and Title IV-D imposes mandatory requirements, we must conclude that the statute itself does not provide a "comprehensive remedial scheme which leaves no room for additional private remedies" in order to hold that Title IV-D confers an enforceable right on Howe and the class members to sue under section 1983. Suter, 112 S. Ct. at 1368

& n.11. Title IV-D confers an enforceable right on Howe and the class members to sue under section 1983. Suter, 112 S. Ct. at 1368 & N. 11. Title IV-D does contain an enforcement scheme in the form of fiscal sanctions the federal government may assert against the State, but these remedial measures are neither comprehensive nor available to the class. The federal government's authority to audit and impose monetary sanctions does not constitute "comprehensive" remedies. See Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 423 (1987) (finding a federal agency's authority to audit and withhold federal funds insufficient to show Congress' intent to preclude section 1983 actions). Furthermore, Howe and the class have no alternative enforcement remedy because the State has continuously refused to assist them in obtaining Title IV-D services to which

they are entitled. We see no enforcement provisions in Title IV-D that show a congressional intent to foreclose these Indian women and children from asserting private remedies. We cannot believe that in enacting Title IV-D Congress intended to deny child support enforcement services and paternity determination for a such a large segment of the South Dakota population.

Our analysis under Wilder and Suter leads us to the conclusion that the Howe class may assert their claims under section 1983.

We affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Appeal from the United States
District Court for the
District of South Dakota

No. 92-3354SDP

Velda Howe, on behalf of themselves, their children, and all others similarly situated; Theresa Taken Alive, on behalf of themselves, their children, and all others similarly situated,

Appellees,

vs.

James Ellenbecker, in his capacity as Secretary of the South Dakota Department of Social Services; Terry Walter, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement,

Appellants,

Louis W. Sullivan, in his capacity as Secretary of the United States Department of Health and Human Services,

Defendant.

JUDGMENT

This appeal from the United States District Court was submitted on the record of

the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this court.

A true copy.

ATTEST:

/s/ Michael E. Gans, Clerk
U.S. Court of Appeals
Eighth Circuit

MANDATE ISSUED 11/3/93

APPENDIX C

VELDA HOWE, Theresa Taken Alive, on behalf of themselves, their children, and all others similarly situated, Plaintiffs,

v.

JAMES ELLENBECKER, in his capacity as Secretary of the South Dakota Department of Social Services; Terry Walter, Program Administrator, South Dakota Office of Child Support Enforcement, and Louis Sullivan, M.D., in his capacity as Secretary of the United States Department of Health and Human Services, Defendants.

Civ. No. 90-3007

United States District Court,
D. South Dakota, C.D.

Sept. 18, 1991

Aid to Families with Dependent Children (AFDC) recipients whose children had absent parents residing on Indian reservation brought class action against state officials and the Secretary of the Department of Health and Human Services (HHS), claiming they had been denied child support collection services to

which they were entitled under the Social Security Act. The District Court, Donald J. Porter, J., held that: (1) Title IV-D of the Social Security Act, dealing with child support enforcement, created enforceable right in AFDC recipients, and recipients had standing to bring § 1983 action to enforce claims for child support enforcement services, and (2) Title IV-D does not permit the HHS to deny federal financial assistance to states to pursue absent Indian parents who reside and work on Indian reservation.

So ordered.

1. **Civil Rights**

**Social Security and Public Welfare**

Title IV-D of the Social Security Act, dealing with child support enforcement, created enforceable right in Aid to Families with Dependent Children (AFDC) recipients, and

recipients had standing to bring § 1983 action to enforce claims for Title IV-D child support enforcement services. Social Security Act, § 452 et seq., as amended. 42 U.S.C.A. § 651 et seq.; 42 U.S.C.A. § 1983.

2. **Federal Civil Procedure**

Nine South Dakota Indian tribes were not indispensable parties to civil rights action brought by Aid to Families with Dependent Children (AFDC) recipients whose children had absent parents residing on Indian reservations within South Dakota, claiming that they have been denied child support collection services secured them under the Social Security Act, and thus, failure to join tribes did not warrant dismissal of suit. Social Security Act, § 451 et seq., as amended, 42 U.S.C.A. § 651 et seq.; Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

3. **Social Security and Public Welfare**

Title IV-D does not permit the Department of Health and Human Services (HHS) to deny federal financial assistance to states to pursue absent Indian parents of children whose custodial parents are recipients of Aid to Families with Dependent Children (AFDC) benefits when the absent Indian parent resides and works on an Indian reservation and the tribe does not comply with Title IV-D regulations; child support enforcement services could be provided recipient by reaching agreement with respective tribal governments, or state could utilize tribal court system. Social Security Act, § 451 et seq., as amended, 42 U.S.C.A. § 651 et seq.

4. **Social Security and Public Welfare**

Any interpretation of Title IV-D of Social Security Act, dealing with child support enforcement, that results in exclusion

of large percentage of Indian children and their parents from its benefits is unreasonable and contrary to language and purposes of the Act. Social Security Act, § 451 et seq., as amended, 42 U.S.C.A. § 651 et seq.

**5. Declaratory Judgment**

Declaratory relief may be granted regardless of availability of an injunction. 28 U.S.C.A. § 2201(a).

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David L. Zuercher, Asst. U.S. Atty., Pierre, S.D., Lucille Meis, Office of Chief Counsel, Health and Human Services, Denver, Colo., for Federal defendant.

MEMORANDUM OPINION

DONALD J. PORTER, District Judge.

On February 8, 1990, plaintiffs Velda Howe and Theresa Taken Alive filed this class action against defendants James Ellenbecker, Secretary of the South Dakota Department of Social Services, Terry Walter, Program Administrator of the South Dakota Office of Child Support Enforcement and Louis Sullivan, M.D., Secretary of the U.S. Department of Health and Human Services (HHS). Plaintiffs are custodial parents of children who have absent parents residing on Indian reservations within South Dakota. Plaintiffs bring this action on behalf of themselves, their children, and all others similarly situated,

claiming that they have been denied child support collection services secured them under Title IV-D of the Social Security Act, the Child Support and Establishment of Paternity Act, 42 U.S.C. § 651 et seq.[1] Trial was held before the Court on July 23-25, 1991.

FACTS

Plaintiff's Background

Velda Howe is an enrolled member of the Crow Creek Sioux Indian tribe and resides with her four children in Chamberlain, South Dakota. Howe is a present recipient of Aid to Families with Dependent Children (AFDC) for herself and her twelve year old son, Daniel. As a condition of receiving AFDC, Howe was required to cooperate with the state in establishing her child's paternity, in

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[1] The matter was certified as a class action by order filed October 24, 1990.

securing child support for her children, and in assigning to the state the right to receive child support for her son. Howe expressed a willingness to cooperate with the state in establishing paternity and collecting support, and identified the putative father of Daniel for the State Office of Child Support Enforcement. Howe claims that despite her cooperation and repeated requests, the state has made no effort to establish the paternity of Daniel because the putative father lives on a South Dakota Indian reservation.

Theresa Taken Alive receives AFDC from the State of South Dakota for her minor child, Caroline. Taken Alive has custody of Caroline pursuant to a Judgment and Decree of Divorce from the Standing Rock Sioux Tribal Court. This decree requires that Caroline's father pay child support in the amount of $300,00. per month to Theresa Taken Alive. Taken Alive

has informed the State Office of Child Support Enforcement of the decree of divorce but claims that the state has refused to attempt to collect child support from Caroline's father because he lives on a South Dakota Indian reservation.

Plaintiffs claim that the state defendants refusal to assist them in obtaining child support and the federal defendant's refusal to provide matching funds to assist the state in child support enforcement violates Title IV-D of the Social Security Act and denies plaintiffs their right to child support collection services on the basis of their race, in violation of the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment to the United States Constitution.

AFDC AND TITLE IV-D

AFDC is a federal-state cooperative effort administered by the states. The program provides monetary payments from the state to financially needy families, which include children deprived of parental support due to death, disability or desertion. 42 U.S.C. § 601 et seq. States are not required to participate in the AFDC program but, if they do so, they must operate the program in compliance with the statutory requirements and the regulations promulgated by the Secretary. One of these requirements is that the state have a plan in effect for child support collection which meets the standards set forth in Title IV-D of the Social Security Act. 42 U.S.C. § 651 et seq.; See also Wehunt v. Ledbetter, 875 F.2d 1558, 1559-60 (11th Cir. 1989), cert. denied sub nom. Brown v. Ledbetter, --- U.S. ---, 110 S.Ct. 1472, 108

L.Ed.2d 609 (1990); Id. at 1569 (Clark, J., dissenting).

The federal government has made efforts since 1950 to require that absent parents support their children. The early attempts were near-complete failures. Wehunt, 875 F.2d at 1569. In 1974, Congress enacted the Social Security Amendments of 1974 which radically revised the previous law. This new law provided for increased matching funds and incentive payments to local governmental units to improve their enforcement of support orders. The 1974 changes also required families to assign their child support payments to the state as a condition of receiving AFDC. Id. at 1569.

In 1984, a second set of changes in the child support enforcement requirements was instituted to strengthen Title IV-D. These changes required states to pass laws for

mandatory wage withholding and liens and provided for federal tax withholding availability and access to Federal Parent Locator Services. Id. at 1570. These 1984 amendments were "intended to ensure that 'all children in the United States who are in need of assistance in securing financial support from their parents will receive assistance regardless of their circumstances.'" Id. quoting S.Rep. No. 98-387, 98th Cong., 2nd Sess., at 1 U.S.Code Cong. & Admin.News 1984, p. 2397. This also provided that paternity establishment services be provided to both AFDC and non-AFDC recipients. Id.

The Deficit Reduction Act of 1984 also had an effect on Title IV-D. This act provided that when a non-custodial parent of a child receiving AFDC makes support payments to the state, the first fifty dollars collected would be paid to the family without affecting

the amount of assistance it received. 42 U.S.C.S. § 657(b)(1) (1985).

States must comply with the Title IV-D child support enforcement regulations or they risk the withholding of federal matching funds. The state is required to undertake the establishment of paternity and the enforcement of support obligations for all AFDC children and non-recipients as well. The state must comply with the regulations promulgated by the Secretary, including a time frame within which states must respond to requests for support enforcement assistance. Wehunt, 875 F.2d at 1561.

The Secretary of the U.S. Department of Health and Human Services is responsible for implementing state plans and establishing regulations for the Title IV-D program. 42 U.S.C.S. § 652 (1985). The state plans are required by statute to be in effect in all

political subdivisions of the state, and to provide for entering into cooperative arrangements with appropriate courts and law enforcement officials. 42 U.S.C.S. § 654 (1985). The state plans are further required to provide child support collection and paternity determination services for AFDC children, for foster children, and for any individual not otherwise eligible for services. Id.

Neither the statute nor the regulations enacted by the Department of Health and Human Services consider the question of how states are to operate child support collection schemes in non-Pub.L. 280 states where Indian reservations exist. There are no regulations exempting states from providing support enforcement services to Indian families whose absent parent resides on an Indian reservation and there is no authorization for Indian

Tribes to provide AFDC programs on the reservation.

The Secretary has interpreted Title IV-D and the regulations promulgated by HHS in developing a policy that deters states from using tribal courts to assist in child support collections unless the tribal court utilizes tribal or state law that conforms with Title IV-D. Under this policy, the state is encouraged to enter into cooperative agreements with the tribes to provide services on the reservations. The states may enter into these agreements with a tribe and provide services as long as the tribe has enacted tribal law or agreed to use state law which complies with Title IV-D in those areas in which the service is to be provided. If no cooperative agreement exists that ensures compliance with Title IV-D, the states do not receive federal funding for child support

collection actions taken against an absent parent under the jurisdiction of the tribe.[2] At present, the state does not have a cooperative agreement with any tribe in South Dakota.

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[2] For example, federal funding would not be available for the following activities:

1) Where the state has an agreement with the tribe that allows tribal personnel to pursue child support enforcement activities against persons who are within tribal jurisdiction, applying a tribal code which does not conform to Federal IV-D requirements.
2) Where the state has an agreement with the tribe that allows state or county IV-D personnel to pursue child support enforcement activities against persons who are within tribal jurisdiction applying a tribal code which does not conform with Title IV-D requirements.
3) Where the state, without an agreement with the tribe, pursues child support enforcement activities against persons who are within tribal jurisdiction through utilization of tribal courts which do not apply law which conforms with Title IV-D.

South Dakota Child Support Enforcement Procedures

The South Dakota Office of Child Support Enforcement (OCSE) consists of approximately 60 employees under the direction of Program Administrator Terry Walter. In addition to the OCSE employees, OCSE contracts with over 50 states attorneys and utilizes the services of special assistant attorneys general to provide legal assistance to persons seeking child support enforcement services. OCSE is funded largely through federal matching funds, through its share of child support collected and through incentive grants offered by the federal government. OCSE handles over 23,000 cases, assisting AFDC families, non-AFDC families and foster children in collecting child support payments. Of these 23,000 cases, over 5,000 involve absent Indian parents who live and work on the reservation.

OCSE follows a basic four step approach to child support enforcement cases when the absent parent lives or works in South Dakota but not within an Indian reservation. Upon receiving an application from a parent requesting collection assistance, OCSE first attempts to locate the absent parent. OCSE then sends the absent parent a notice of support debt asking the parent to provide OCSE with financial data so that they can determine the amount owed by the absent parent. OCSE next attempts to obtain a stipulation from the absent parent admitting paternity and agreeing to pay the amount owed. Finally, if the absent parent will not stipulate to paternity or to the amount owed, the case is turned over to legal counsel who attempt to obtain paternity determinations and support orders through the state courts.

In cases where the absent parent is an Indian who lives and works on the reservation, OCSE locates the absent parent and asks him or her to stipulate to paternity and to child support payment obligations. However, because state courts do not have jurisdiction over Indians residing on the reservations, the state is unable to pursue these parents through use of the state courts. The state has attempted to enforce state court orders on the reservation but has had little success because of the jurisdictional barriers. The state does not utilize tribal courts to pursue absent parents, in part because the federal government has notified the state that federal matching funds would not be available for pursuing child support claims through the

tribal court system.[3] When the state is audited by the federal government, these cases are not considered in determining whether the state has complied with Title IV-D requirements. South Dakota has not been sanctioned by the federal government for non-compliance with federal regulations in the treatment of cases where the absent parent lives and works on the reservation.

Tribal Court Systems

There are nine tribes located within the boundaries of South Dakota. Each of these tribes operates a tribal court system which has jurisdiction over tribal members. Judges from the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the Oglala Sioux

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[3] There was evidence presented at trial that on at least one occasion, the state threatened to sanction an individual who had not made attempts on her own to obtain a child support order through a tribal court.

Tribe and the Rosebud Sioux Tribe all testified at trial that these tribal courts were open courts in which the state may properly bring paternity and child support actions against Indian parents living on the reservations. There were no facts presented which would indicate that any South Dakota Indian Tribal court would prohibit the state from utilizing the court for child support enforcement orders. Each of the tribes has separate tribal codes; however, none of the tribes have laws that fully comply with Title IV-D.

Plaintiffs presented evidence that, from 1983 to 1990, the North Dakota Office of Child Support Enforcement contracted with Maury Thompson, States Attorney for Sioux County, North Dakota, to provide child support enforcement services through the Standing Rock Sioux Tribal Court. The Standing Rock

Reservations is located within both North and South Dakota. Thompson was successful in establishing paternity and obtaining support orders but, because of the unemployment and poverty on the reservation, was less successful in collecting under the support orders. However, because of his efforts in obtaining the orders, the state was able to use enforcement techniques such as federal tax intercept to collect some of the support money due. North Dakota received federal matching funds to assist in paying for the contract with Thompson. The contract was terminated in January, 1990 when HHS announced that it would no longer provide matching funds for child support enforcement services performed through tribal courts that did not fully comply with Title IV-D. In addition to the contract with Thompson, the North Dakota OCSE also contracted with other attorneys to provide

child support enforcement services through other tribal courts in North Dakota. Through the use of these contracts, the North Dakota OCSE was able to obtain paternity determinations and child support orders from the various tribal courts. These contracts were also terminated when HHS announced that it would no longer provide matching funds.

ANALYSIS AND DISCUSSION

Motions to Dismiss

[1] The defendants argue that this case must be dismissed because Title IV-D of the Social Security Act does not afford individuals a private right of action and thus plaintiffs do not have standing to bring this action.

Plaintiffs have sued under 42 U.S.C. § 1983. Section 1983 authorizes suits against those acting under color of state law for violations of federal law and for violations

of the U.S. Constitution. Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). The Supreme Court has ruled that there are two situations where a § 1983 action based upon violation of a federal statute may not be brought. First, an action may not be brought under § 1983 for violation of a federal statute if that statute does not create enforceable rights in the plaintiff. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24, 101 S.Ct. 1531, 1543, 67 L.Ed.2d 694 (1981). Second, a plaintiff may not bring suit under § 1983 for violation of a federal statute if Congress has foreclosed private enforcement in the enactment of the statute. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20, 101 S.Ct. 2615, 2626, 69 L.Ed.2d 435 (1981).

Four recent cases have addressed the issue of whether a plaintiff has standing to

bring a § 1983 action for violation of Title IV-D of the Social Security Act. In Wehunt v. Ledbetter, 875 F.2d 1558 (11th Cir. 1989), cert. denied sub nom., Brown v. Ledbetter, --- U.S. ---, 110 S.Ct. 1472, 108 L.Ed.2d 609 (1990), the Eleventh Circuit Court of Appeals, with Judge Clark dissenting, dismissed a complaint against the Commissioner of the Georgia Department of Human Resources after determining that Title IV-D did not afford the plaintiff an enforceable right. Since that decision, three courts have held that § 1983 does create enforceable rights. See Carelli v. Howser, 923 F.2d 1208, 1211 (6th Cir. 1991),[4] reh'g denied en banc, 1991 WL 3470,

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[4] In Carelli, the 6th Circuit rejected the holding in Wehunt, concluding that the plaintiffs in that case, all those currently eligible for child support enforcement in Clermont and Brown Counties of Ohio, were afforded an enforceable right in Title IV-D. The Court went on to hold that under the

1991 U.S.App. LEXIS 7102 (6th Cir. 1991); Behunin v. Jefferson County Dept. of Social Services, 744 F.Supp. 255 (D. Colo. 1990); Beasley v. Ginsberg, Civ. No. H-86-619, 1989 WL 202144, U.S. Dist. LEXIS 16682 (1989).

In determining whether plaintiff has standing to bring this action under § 1983, it must first be determined whether Congress has created enforceable rights in Title IV-D. If Title IV-D was intended to benefit the putative plaintiffs, an enforceable right exists unless it merely reflects a Congressional preference for a certain kind of conduct, rather than a binding obligation on

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circumstances of that case, where the Federal Secretary had already taken corrective action against the state, private enforcement was foreclosed. Under the facts of this case, the federal defendant has not taken corrective action but rather has taken the position that plaintiffs are not entitled to the benefits they seek.

the governmental unit, or unless the interest sought to be enforced is so vague and amorphous as to be beyond the competence of the judiciary to enforce. Wilder v. Virginia Hosp. Ass'n, --- U.S. ---, ---, 110 S.Ct. 2510, 2516-18, 110 L.Ed.2d 455 (1990). Upon examining Title IV-D and the legislative history that accompanied its enactment, this court finds that Congress intended Title IV-D to benefit persons such as the plaintiffs, and that the intent is expressed within Title IV-D as a binding obligation on the government and not merely as a Congressional preference.

There are several factors present that lead to the belief that Congress, in enacting Title IV-D, intended to benefit women and children in AFDC families such as the plaintiffs. The first and most obvious is the purpose of Title IV-D set out at 42 U.S.C. § 652:

> For the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part [42 U.S.C. §§ 651 et seq.] to all children (whether or not eligible for aid under part A [42 U.S.C. §§ 651 et seq.] for whom such assistance is requested....

42 U.S.C. § 651 (emphasis supplied). This statutory purpose demonstrates that Congress had a specific and primary intent to aid families in child support enforcement when enacting Title IV-D.

Two additional factors which reveal that Congress' primary intent in enacting Title IV-

D was to aid the families of absent parents are found in the fact that Congress has expressly required states to provide Title IV-D services to non-AFDC families as well as to those receiving the benefits and that Congress has required that the first $50 collected from absent parents of AFDC recipients go to the family without a corresponding offset to the AFDC payments. These requirements would be inconsistent with the claim that the primary purpose of Title IV-D was to recoup welfare expenditures.

The most important factor indicating that Congress intended to aid families of absent parents and to give these families an enforceable right is the language of Title IV-D. Precatory rather than mandatory language was determined in Pennhurst to be an important factor in determining that a statute created no privately enforceable rights. 451 U.S. at

19-20, 101 S.Ct. at 1540-41. The language in Title IV-D is mandatory and set out in specific and definite terms that directly benefit the children and families entitled to support enforcement services. It sets forth what states must do to participate in the program. For example, participating states must establish the paternity of children born out of wedlock, 42 U.S.C. § 654(4)(A); they must secure payments for abandoned children and their remaining parent, 42 U.S.C. § 654(4)(B); and they must provide notice of the mount collected to each family at least annually. 42 U.S.C. § 654(5)(A); see also Carelli, 923 F.2d at 1210; Carelli v. Howser, 733 F.Supp. 271, 276 (S.D. Ohio 1990), rev'd, 923 F.2d at 1208 (6th Cir. 1991) (examples of the mandatory language found within Title IV-D). The strong mandatory language combined with the factors previously discussed leads

this Court to find that Title IV-D of the Social Security Act does create an enforceable right in plaintiffs.

Plaintiffs may also be denied standing if it is shown that Congress has foreclosed private enforcement in the enactment of Title IV-D. See Middlesex County, 453 U.S. at 20, 101 S.Ct. at 2626. The state defendants have the burden to demonstrate "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." Wright v. Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 423, 107 S.Ct. 766, 770, 93 L.Ed.2d 781 (1987). A court should not lightly conclude that Congress intended to preclude the § 1983 as remedy for the deprivation of a federally secured right. Id. at 423-24, 107 S.Ct. at 770-71. The state defendants have set forth no specific provision or other

evidence that would indicate to the court that Congress has precluded private enforcement of Title IV-D. The Court therefore finds that plaintiffs do have standing under § 1983 to bring this action to enforce their claims for Title IV-D child support enforcement services.

[2] Defendants also argue that this case must be dismissed for failing to join indispensable parties as required by Rule 19 of the Federal Rules of Civil Procedure. Defendants claim that the nine South Dakota Indian tribes are indispensable because they have major interests and must consent to 'encroachment by the state of South Dakota within reservation boundaries and by use of their independent tribal court systems." See State Defendants' Post-Trial Brief at p. 3. As is made evident by this Court's holding, consent of the tribes is not essential to provide plaintiffs relief. The Court will

therefore decline to dismiss this case for failure to join the nine South Dakota Indian tribes.

Interpretation of Title IV-D

[3] HHS has interpreted Title IV-D to preclude federal financial assistance to states to pursue absent Indian parents who reside and work on an Indian Reservation when the tribe does not comply with Title IV-D regulations. Following well-established principles of administrative law, this Court must give substantial deference to an agency's interpretation of a statute that it administers, and cannot substitute its judgment for a reasonable interpretation by the agency. Rust v. Sullivan, --- U.S. ---, ---, 111 S.Ct. 1759, 1766-68, 114 L.Ed.2d 233 (1991); Connecticut Dept. of Maintenance v. Heckler, 471 U.S. 524, 532, 105 S.Ct. 2210, 2214, 85 L.Ed.2d 577 (1985). Where the

agency's interpretation of a statute "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 845, 104 S.Ct. 2778, 2783, 81 L.Ed.2d 694 (1984), reh'g denied, 468 U.S. 1227, 105 S.Ct. 28, 82 L.Ed.2d 921 (quoting United States v. Shimer, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)).

Although Courts must give substantial deference to an agency's interpretation, they are not required to "rubber stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying

a statute." Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97, 104 S.Ct. 439, 444, 78 L.Ed.2d 195 (1983) (quoting NLRB v. Brown, 380 U.S. 278, 291-292, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965)). The Administrative Procedures Act provides that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 42 U.S.C.S. § 706(2)(A) (1985). While the scope of review under this standard is narrow, the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Environmental Defense Fund v. E.P.A., 852 F.2d 1316, 1326 (D.C.Cir. 1988), cert. denied, 489 U.S. 1011, 109 S.Ct. 1120, 103 L.Ed.2d 183 (1989) (quoting Motor Vehicle Mfrs. Ass'n v.

State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983)). "Moreover, if the agency 'does not reasonably accommodate the policies of a statute or reaches a decision that is "not one that Congress would have sanctioned," . . . a reviewing court must intervene to enforce the policy decisions made by Congress.'" Environmental Defense Fund, 852 F.2d at 1326 (quoting National Resources Defense Council v. Herrington, 768 F.2d 1355, 1383 (D.C.Cir. 1985)). Upon review of the language of Title IV-D and the underlying purpose of the statute, this Court is unable to find that HHS's interpretation is a reasonable one.

The language and structure to Title IV-D are the foremost indicators that Congress intended all children to benefit from the child support enforcement services established by the statute. 42 U.S.C.S. § 651

specifically provides that the purpose of the Title IV-D is to enforce "the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available ... to all children for whom such assistance is requested." 42 U.S.C.S. § 651 (1985) (emphasis supplied). Further, § 654 provides that "A state plan for child and spousal support must-- ... (6) provide that (A) the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services...." 42 U.S.C.S. § 654(6) (1991) (emphasis supplied).

This language strongly indicates that Congress did not give HHS the authority to arbitrarily deny services to a large group of Indian children simply because jurisdiction over their absent parents rests with the tribal government rather than the state government. While the defendants argue that jurisdictional problems[5] have severely hindered any attempts to pursue Indian absent parents, it is clear that defendants' attempts have been limited to the use of state court enforcement procedures. While Congress may have intended and envisioned that the states would enter into cooperative agreements with

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[5] There is no dispute among the parties that the state does not have jurisdiction to enforce state court orders against Indians living and working on the reservation. See Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990), reh'g denied en banc, 1990 U.S. App. LEXIS 9521 (8th Cir. 1990), cert denied, --- U.S. ---, 111 S.Ct. 2009, 114 L.Ed.2d 98 (1991).

tribes to solve jurisdictional problems, no agreements have resulted. It is unreasonable to assume that since the tribes have refused to submit to state jurisdiction, Indian children who in many cases have no relationship with the tribe should therefore be entitled to a lesser degree of assistance in obtaining paternity determinations and child support orders.

This is also not a case where plaintiffs are asking the defendants to undertake unreasonable measures to assist them. Defendants could provide enforcement services by reaching agreement with the respective tribal governments or they could utilize the tribal court system. The state currently has contractual agreements with state's attorneys who provide legal services to individuals seeking child support in state court. The court cannot see any significant distinction

in providing those same services to individuals pursuing Indian absent parents in tribal courts.[6] While the forum may be different, attorneys familiar with the tribal courts could contract to provide the services in the same manner currently practiced in state court.

[4] The defendants, citing § 655(a)(1), contend that appropriations are authorized

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[6] Defendants attempted to show that tribal courts were incompetent or somehow inferior to state courts in that they were uncooperative with OCSE, showed favoritism toward certain tribal members and that they were manipulated by the tribal council. In light of recent decisions recognizing the sovereignty of tribal governments, it is important that tribal courts be recognized as legitimate tribunals for the resolution of disputes that come within tribal jurisdiction. As the U.S. Supreme Court stated in Santa Clara Pueblo v. Martinez: "Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." 436 U.S. 49, 65, 98 S.Ct. 1670, 1680-81, 56 L.Ed.2d 106 (1978).

only for the operation of plans approved under §654 of the plan. Because federal regulations promulgated by the Secretary require all cooperative agreements to comply with Title IV-D, see 45 C.F.R. § 303, 107(c), the defendants assert that they are unable to provide services on the reservations unless the tribes comply with Title IV-D regulations. The Court finds this argument unpersuasive for three reasons. First, an agency's interpretation of a statute is entitled to great deference unless that interpretation is unreasonable or inconsistent with the policies and purposes of the statute. Bureau of Tobacco, Alcohol and Firearms v. FLRA, 464 U.S. 89, 97, 104 S.Ct. 439, 444 78 L.Ed.2d 195 (1983). As discussed above, the Court finds that any interpretation of Title IV-D that has as its result the exclusion of a large percentage of Indian children and their

parents from the benefits of the statute is unreasonable and contrary to the language and purposes of the statute.

Secondly, this is not a situation where plaintiffs are able to conform their conduct to comply with Title IV-D. While the situation would be resolved if the tribes would adopt the Title IV-D regulations, plaintiffs do not control what laws are adopted by the tribe. In many cases, the individuals seeking assistance may not be members of the tribe or even live on the reservation and, thus, have very little influence over tribal policies. It is thus unreasonable to deprive them of Title IV-D services in an effort to encourage the tribes to adopt Federal regulations.

Finally, the Court is not convinced that the use of tribal courts to pursue absent parents would be contrary to the agency's own

regulations.[7] The regulations provide that services not performed in compliance with Title IV-D requirements are not eligible for Federal funding. See 45 C.F.R. § 304.22; Federal Defendant's Post-Trial Brief at p. 8. Were the state to utilize the tribal courts in assisting plaintiffs, the services provided would be the legal counsel and tribal court fees, not the use of the tribal court. These regulations provide that these services, and not the tribal court itself, comply with Title IV-D.[8]

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[7] There was testimony at trial that the tribal courts are open forums which would allow the commencement of paternity and child support actions without any existing cooperative agreement.

[8] To the extent that the agency's regulations and policies do deter the state from providing Title IV-D services to the plaintiffs, they are unreasonable and contrary to the language and purpose of the statute.

The state defendants have continually argued throughout this action that they have attempted to provide child support enforcement services through the state court and have been thwarted in these attempts by the tribes' unwillingness to allow enforcement of state court orders on the reservations. Defendants claim that based upon the decisions in Rosebud Sioux Tribe, 900 F.2d at 1172, and State v. Spotted Horse, 462 N.W.2d 463 (S.D. 1990), this Court cannot grant the relief requested by plaintiffs. These decisions, however, recognize tribal jurisdiction over Indians living on the reservation and do not stand for the proposition that the state may not bring claims in tribal court or may not enter cooperative agreements with the tribes. As long as the state respects the tribe's jurisdiction and provides Title IV-D services through cooperative agreements with the tribes

or through utilization of the tribal courts, it will not have unlawfully infringed upon tribal jurisdiction.

The state defendants also presented several hypothetical situations in which they claim it would be unreasonable for them to pursue absent parents through the tribal courts. Defendants suggest that the tribes could prohibit the state from using the tribal court when disputes arise or that situations exist where the tribal court would not have jurisdiction over an Indian absent parent living on the reservation.[9] The Court is not

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[9] The state defendants argue that ordering them to pursue Indian absent parents who live on the reservation could create a "haven" for these individuals on the Rosebud Reservation because the Rosebud Sioux Tribe does not claim jurisdiction over Indians who are not members of the tribe. This argument is flawed in that it assumes that there are individuals living on the Rosebud Reservation who are not subject to any jurisdiction. Even in the event that this assumption could be true, this Court's

suggesting through this opinion that the state must pursue Indian absent parents living on the reservation through the tribal courts when the tribe has not provided a reasonable access to the court. The Court does, however, find that where no cooperative agreement has been made with a tribe for the pursuit of absent parents within the tribes jurisdiction, and where reasonable access to a tribal court exists, the children of Indian absent parents are entitled to the same degree of child support enforcement service as other children pursuing claims in state court.[10]

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order would only reduce the size of the "havens" which currently exist on all reservations within the state because of defendants' refusal to provide Title IV-D services to plaintiffs.

[10] The Court notes that even though the high unemployment rates on the reservation may make it difficult to collect support on the reservation, an important service is provided to children through the establishment of their

CONCLUSION

Congress enacted Title IV-D for the purpose of "assuring that assistance in obtaining support will be available to all children...." 42 U.S.C.S. § 651 (1985). While this does not require defendants to take unreasonable steps to provide child support services to anyone, the Court finds that it does require defendants to provide equal services to children and families in like situations. Simply put, this Court cannot find that, in enacting Title IV-D, Congress intended to permit defendants to exclude a large percentage of Indian children from its benefits. It is not for this Court to determine how defendants will provide the

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paternity. This is particularly true in the case of Indian children where the establishment of an Indian parent may entitle them to membership in the tribe, and to certain federal benefits.

Title IV-D services to plaintiffs. Evidence presented at trial established that reasonable avenues exist for the provision of these services. Where these reasonable avenues exist, defendants must provide plaintiffs the services they are entitled to receive.

[5] The Declaratory Judgment Act authorizes this Court to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). Declaratory relief may be granted regardless of the availability of an injunction. Green v. Mansour, 474 U.S. 64, 72, 106 S.Ct. 423, 427, 88 L.Ed.2d 371 (1985) (citing Steffel v. Thompson, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974)). Accordingly, plaintiffs are granted declaratory judgment.

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

ORDER CIV. 90-3007

Velda Howe, Theresa Taken Alive, on behalf of themselves, their children, and all others similarly situated,

Plaintiffs,

vs.

James Ellenbecker, in his capacity as Secretary of the South Dakota Department of Social Services,

Terry Walter, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement

Louis Sullivan, M.D., in his capacity as Secretary of the United States Department of Health and Human Services,

Defendants.

The Court finds that defendants' policy of denying child support collection services to plaintiff's and their children because the children's absent parents reside on South

Dakota Indian reservations violates Title IV-D of the Social Security Act. It is therefore

ORDERED that declaratory judgment is entered for plaintiffs in accordance with the findings of fact and conclusions of law as fully set forth in the Court's Memorandum Opinion filed this date.

Dated September 18, 1991.

BY THE COURT:

/s/ Donald J. Porter
U.S. District Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK
By /s/ Vicky J. Reinhard
Deputy

(Seal of Court)

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

MEMORANDUM ORDER CIV. 90-3007

VELDA HOWE and THERESA TAKEN ALIVE, on behalf of themselves, their children and all others similarly situated,

Plaintiffs,

vs.

JAMES ELLENBECKER, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement, and LOUIS SULLIVAN, M.D., in his capacity as Secretary of the United States Department of Health and Human Services,

Defendants.

On September 18, 1991, this Court granted declaratory relief in favor of Plaintiffs in the above-entitled case. On November 1, 1991, a hearing was held at the United States Courthouse, Pierre, South Dakota, during which counsel for all parties had the opportunity to propose what further relief should

appropriately flow from this Court's September 18, 1991, memorandum opinion. On November 13 and November 15 respectively, State and Federal Defendants each filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit dismissed both Defendants' appeals. This Court now issues this memorandum order to provide Plaintiffs further relief in accordance with its previous memorandum opinion.

## Discussion

Plaintiffs and similarly situated persons are in a unique position with respect to the implementation of Title IV-D of the Social Security Act, the Child Support and Establishment of Paternity Act, 42 U.S.C. §§ 651 et seq. In order to receive federal aid for child support enforcement services,

participating states must draft a State plan, which is to follow fairly strict federal requirements. The states must, according to the regulations promulgated pursuant to the statute, pass laws to ensure certain procedures will be carried out in the effort to fulfill the purposes of the Act. 45 C.F.R. § 302.70. A State plan must be in effect in all political subdivisions, 42 U.S.C. § 654 (1); and a state's Title IV-D agency must administer the plan in conformity with Title IV-D requirements, 45 C.F.R. § 301.10. If the state's Title IV-D agency delegates any of the Title IV-D functions to a local agency or official, the state agency has the responsibility to ensure compliance with the State plan. 45 C.F.R. § 302.12(a)(3). Federal financial and technical assistance is available for many of the expenditures associated with implementation of this

federal-state cooperative effort. See 45 C.F.R. pt. 304; 45 C.F.R. § 301.15.

Neither Congress nor the Department of Health and Human Services, when adopting these statutes and regulations, seems to have contemplated the existence of a sovereign Native American Indian Tribe within a state's borders. South Dakota provides a situation in which a state that chose to participate in this federal-state cooperative effort has different laws governing different groups of people living within its boundaries. As stated, the statutory and regulatory scheme requires a participating state to pass certain laws in order to become eligible for federal financial assistance. 45 C.F.R. § 302.70. The State must also ensure that all parties to cooperative agreements or purchase of service contracts, which a state enters with courts, law enforcement officials, and attorneys to

provide these child support enforcement services, comply with the federal requirements. 45 C.F.R. § 303.107; 45 C.F.R. § 304.22. Those requirements would include adherence to the newly enacted federally mandated state laws. The state courts, in which these services would be provided, are already bound by state law, and would therefore be required to follow those laws passed to conform to federal requirements as well. In South Dakota, however, the State has no jurisdiction over the nine tribes residing within its borders. See Rosebud Sioux tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2009, 114 L. Ed. 2d 98 (1991). As a result, the statutory and regulatory scheme has left a gap: If South Dakota considers the Indian tribes "political subdivisions" and enters cooperative agreements or purchase of service

contracts to provide child support enforcement services to children who have an Indian absent parent living on a reservation, the State runs the risk that the tribal court, unlike a state court, will not recognize the Title IV-D mandated state laws.

The parties have proposed methods by which the State of South Dakota would negotiate with a tribe or tribal court to provide for the delivery of child support enforcement services just as it would negotiate with its own state courts, agencies, or private attorneys to provide these services in the state courts. Again, however, because the State in this instance has no power to demand compliance with its own State plan (a prerequisite for federal funding), such negotiations would not necessarily result in Plaintiffs receiving the relief requested. The Court finds, as a result, that such

negotiations between a state and a sovereign Indian tribe were not necessarily considered by Congress or the Department of Health and Human Services when requiring administration and implementation of Title IV-D State plans in all political subdivisions of the state. Federal Defendants assert otherwise. Specifically, they argue that cooperative agreements with tribal entities are indeed contemplated by 42 U.S.C. § 654(7) and 45 C.F.R. § 303.107 to assist South Dakota in carrying out its State plan. The Court, however, does not find this to be a particularly appropriate approach to the problem. A sovereign tribal entity with jurisdiction within its own borders simply cannot be forced to comply with state laws, or a State plan, even if that plan is dictated by federal, not state, law.

The Court reiterates that Congress, in passing Title IV-D of the Social Security Act, "intended all children to benefit from the child support enforcement services established by the statute." Howe v. Ellenbecker, 774 F. Supp. 1124, 1231 (D.S.D. 1991). Thus, the fact that Indian tribes in South Dakota stand independent of the State of South Dakota cannot prove fatal to the effort to provide these services on the reservations within the State. While the Court appreciates State Defendants' willingness to negotiate with the Tribes, the Court finds that the State may not be the most efficient or effective means by which children with an Indian absent parent living on a reservation may receive child support enforcement services. Rather, the Court finds that the Native American Indian Tribes in South Dakota would more appropriately be treated as states for the

purposes of implementing Title IV-D. Any requirements that the Tribes would have to meet are federal requirements, not requirements initiated by the State of South Dakota, which itself simply follows the federal mandates.

Federal Defendants have stated they are willing to make federal funding available for services provided on Indian reservations in compliance with Title IV-D requirements and to furnish technical assistance in establishing cooperative agreements between the State and the Tribes. This offer of assistance includes help in negotiating these agreements with the tribes, reviewing tribal law for compliance with federal law, and examining proposed cooperative agreements. The Court assumes that Federal Defendants would be willing to provide similar assistance whether or not

State Defendants were involved in the negotiations. Accordingly, it is

ORDERED that Federal Defendants are to propose to the nine Native American Indian Tribes within the State of South Dakota the possibility of implementing a Tribal plan, which would be the statutory and regulatory, as well as functional, equivalent of a State plan as described in 42 U.S.C. §§ 651 et seq and 45 C.F.R. §§ 301 et seq. Federal Defendants are to inform the Court within 60 (sixty) days of this date regarding their progress in complying with this Order.

Dated March 27, 1992.

BY THE COURT:

/s/ Donald J. Porter
U.S. Senior District Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK
By /s/ Vicky J. Reinhard
Deputy

(Seal of Court)

APPENDIX F

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

MEMORANDUM ORDER CIV. 90-3007

VELDA HOWE, THERESA TAKEN ALIVE, on behalf of themselves, their children and all others similarly situated,

Plaintiffs,

vs.

JAMES ELLENBECKER, in his capacity as Secretary of the South Dakota Department of Social Services,

TERRY WALTER, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement, and

LOUIS SULLIVAN, in his capacity as Secretary of the United States Department of Health and Human Services,

Defendants.

The federal defendant in the above-captioned case has filed a Motion for Reconsideration and Request for Stay Pending Reconsideration. Federal defendant strongly

opposes this Court's order filed March 27, 1992, in which the Department of Health and Human Services (HHS) was ordered to negotiate directly with the nine tribes located in South Dakota and to propose to them the possibility of implementing a Tribal Plan that would provide for child support enforcement services on the reservation. This Court had concluded that because the federal statute and regulations refer only to State Plans, neither Congress nor HHS considered the possibility of a semi-sovereign Indian nation existing within the boundaries of a state. The Department of Health and Human Services is the entity that ultimately must approve or disapprove a state's plan based on its degree of compliance with federal law. Because of this role, as well as the State's apparent unsuccessful attempts to provide services to plaintiffs, this Court found that the most efficient and

effective approach was to order direct negotiation between the tribes and HHS. Federal defendant asserts that the Court's approach is contrary to law. Specifically, Federal defendant argues that the statute and regulations refer specifically to State Plans, that Congress intended the Title IV-D program to be implemented as a "coherent whole" within the state, and that Congress authorized payment of federal monies only to states, not to tribes.

Federal defendant also expresses concern about tribal sovereignty. A Tribal Plan, federal defendant asserts, would have to comply with each and every requirement of Title IV-D and would therefore infringe upon the tribe's right of self-government. State defendants have, on several occasions during the course of this litigation, expressed similar concerns. The State has asserted that

neither the State nor this Court can force the tribes to enter agreements or change their tribal laws.

The Court shares these concerns about tribal sovereignty and both recognizes and respects the independent, semi-sovereign status of the nine Indian Tribes located within the State of South Dakota. As a result, the March 27, 1992, memorandum order was addressed to the federal defendant, not to the Indian tribes themselves. At no time has the Court suggested it has the authority to the jurisdiction to order a tribe to enter a cooperative agreement or to modify its tribal laws. The inability of this Court to order specific action on the part of the tribes does not, however, leave plaintiffs without avenues for relief. Any order issued from the Court in this case is simply addressed to the parties before it, not to the tribes or tribal

officials who lie outside the Court's jurisdiction.

Federal defendant strongly objects to negotiating with the tribes in the manner proposed by the Court's order filed March 27, 1992, on the basis that to do so would be contrary to law. Federal defendant asserts instead that cooperative agreements between the state and the tribal entities are contemplated by § 457(7) of the Social Security Act, 42 U.S.C. § 654(7), and 45 C.F.R. § 303.107 (1990). See Federal defendant's Response to Brief of Plaintiffs (Requesting Additional Relief) at 2. The Court appreciates the attempt to seek a solution within the language of the statute itself. The Court finds, however, that just as Tribal Plans were not specifically contemplated by Congress when enacting the statute or by the agency when promulgating the

regulations, neither were such state-tribal agreements. The statute and accompanying regulations anticipate cooperative agreements between a state and its own state courts, courts in which state law would necessarily be followed.[1] The statute and regulations simply do not take into account the possibility that these services might be provided in courts, such as tribal courts located within the State of South Dakota, that are not answerable to state law.

Federal defendant also argues vehemently that Congress authorized funding only for states, not for tribes. The initial requirements regarding the necessary laws that must be passed in order to receive funding are

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[1] Also anticipated were purchase of service agreements in which attorneys, working in the state courts, would provide the Title IV-D child support and enforcement services.

the burden of the state, the entity receiving the funding. Federal defendant suggests that as a result of the limited funding authorization, a tribal entity may be party only to a cooperative agreement and not to its own Tribal Plan. As a result, however, the tribe, to which no federal money flows directly and which has no Plan of its own, should not be required to change its tribal laws. A tribal entity, as a party to a cooperative agreement and thus acting more like a state court than the state itself for the purposes of Title IV-D, would need only recognize those federal mandates that apply to the services covered by its particular cooperative agreement.

Finally, Federal defendant objects to the Court's Tribal Plan proposal on the grounds that the semi-sovereign, independent status of the Indian tribes, in part, prevents the

implementation of any Tribal Plan as proposed by this Court. Federal defendant contends that under the Court's proposed scheme the tribes would be required to comply with all the federal requirements already mandated of the states rather than simply "picking and choosing" among the several Title IV-D program services applicable to its own particularized cooperative agreement with the state.

The Court notes that State defendants initially took a very different position regarding the requirements a tribe would have to meet before obtaining Title IV-D services. This earlier position was the focus of significant dispute among the parties:

> As has been emphasized by the State and Federal Defendants throughout this litigation, before any child support enforcement services can be provided as requested by Plaintiffs herein, the various Indian tribes must meet <u>any and all requirements</u> of Title IV-D of the Social Security Act, as the State Defendants have been required to do. In other

> words, before the State Defendants can avail themselves to the benefits of Title IV-D, including the federal funding as requested by Plaintiff's herein, the State Defendants were, and still are, required to comply with all Title IV-D mandates and requirements. It is the State Defendants' position herein that the tribes must be required to do likewise.

State defendants' letter filed November 14, 1991, in response to Court order filed November 4, 1991 (emphasis original). Nevertheless, the Court finds that the distinction Federal defendant currently makes regarding the requirements a tribal entity must meet provides a sufficient justification for negotiating state-tribal cooperative agreements rather than Tribal Plans in the effort to grant plaintiffs relief. According to the applicable law, the services provided pursuant to cooperative arrangements or agreements must conform with Title IV-D requirements. See 45 C.F.R. § 304.22; Howe v.

Ellenbecker, 774 F. Supp. 1224, 1233 (D.S.D. 1991). Federal defendant has stated it is prepared to provide federal funding for "cooperative arrangements with tribal entities or purchase of service agreements with private attorneys for the provision of child support enforcement services that comply with the conditions set forth in the Federal statute and regulations." Federal defendant's Response to Brief of Plaintiffs (Requesting Additional Relief) at 4. The services, and the agreements pursuant to which those services would be provided in the tribal court, must adhere to federal law. The Court understands, however, that a tribe would not necessarily have to change its tribal code in order to recognize and comply with the provisions of a given cooperative agreement.

The Court's findings are not intended to imply that a tribe's cooperation is irrelevant

to the issue of whether federally funded services would be provided in the tribal courts. The tribes would have to make their courts available for carrying out the federally mandated procedures described in the cooperative agreement, and they would have to recognize these procedures before the child support enforcement services would, or even could, be provided. The Court does not understand, however, that an agreement to provide, for example, genetic testing under the terms of a cooperative agreement and funded largely by the federal government would require a tribe to change its substantive law.[2] How the tribe addresses the issue of genetic testing for establishing paternity in

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[2] Plaintiffs suggested at oral argument that Title IV-D requires states to pass some laws that are simply not applicable to Native American Indian tribes.

situations independent of the Title IV-D program is of no consequence in determining whether the cooperative agreement complies with federal law. The tribe must simply, as the term suggests, "cooperate" with those requirements when services are being provided pursuant to the cooperative agreement.

Both the federal and the State defendants have expressed a willingness to negotiate, in some manner, with the tribes. The Court recognizes that negotiations with the nine Indian tribes to prepare cooperative agreements for the various services provided under Title IV-D may be qualitatively different than any negotiations undertaken pursuant to this statute in the past. Furthermore, no one questions that the Indian tribes in South Dakota have distinct tribal codes, none identical to the code of the State of South Dakota, which has already been

modified to comply with the federal mandates. Yet this Court has determined that "Congress intended all children to benefit from the child support enforcement services established by the statute." Howe v. Ellenbecker, 774 F. Supp. 1224, 1231 (D.S.D. 1991). Accordingly, the Court urges the parties to approach negotiation with a certain degree of flexibility, a recognition of the distinctive relationship among the state, the tribes, and the federal government, and a willingness to acknowledge that the definition of "compliance," as negotiations progress, may have to be shaped to accommodate the unique situation of the Indian tribes within South Dakota.

The Court seeks a solution most amenable to all parties, but one that will nevertheless achieve the ultimate goal: providing child support enforcement services to plaintiffs.

As the federal defendants oppose negotiating directly with the tribes as independent entities capable of carrying out their own Tribal Plans, the Court finds that such an approach would, contrary to its earlier findings, not be the most effective means of granting plaintiffs relief. Accordingly, it is

**ORDERED** that the directives contained in this Court's March 27, 1992, memorandum order are vacated in their entirety. It is further

**ORDERED** that State defendants will use every reasonable effort to negotiate a cooperative agreement or purchase of service agreement with each of the nine tribes in the State of South Dakota. This effort will include, but will not be limited to, sending a letter, as proposed by State defendants, to each tribe. The letter will advise the tribes of the benefits of the Title IV-D program and

the specifics of the state's child support enforcement program. The State defendant shall then propose a meeting with each tribe in order to describe the program more fully and to answer any questions and address any concerns the tribes may have regarding implementation of the program and use of the tribal courts. The discussions would necessarily include an explanation of the federal participation funding scheme, as this may be an important factor in a tribe's decision whether to enter an agreement with the state. It is also

**ORDERED** that the federal defendants shall, in concert with the State defendants, co-author the described letter to each of the tribes. The federal defendants shall also attend any meetings with the tribes to discuss implementation of the Title IV-D program and the use of tribal courts. In addition, the

federal defendants shall provide technical assistance in establishing agreements between the State and the nine Native American Indian tribes located within South Dakota. Specifically, as federal defendants have expressed a willingness to do, federal defendants shall help negotiate the agreements with the tribes and examine proposed cooperative agreements. During the negotiations, both federal and State defendants shall make clear that no changes in tribal law are mandated in order for the tribes to arrange for child support and enforcement services to be provided for children who have an Indian absent parent living on the reservation. Rather, the services themselves, and the cooperative agreements that govern them, must comply with federal law before those services may be

approved and financially supported by the federal government.

It is therefore

**ORDERED** that Federal defendant's Motion for Reconsideration is granted in accordance with this memorandum order. It is further

**ORDERED** that Federal defendant's Request for Stay Pending Reconsideration is granted.

The State defendants have filed a Motion for Reconsideration and Dismissal based upon the recent United States Supreme Court decision in Suter v. Artist, 503 U.S. ___, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992). In Suter, the Court found that the Adoption Assistance and Child Welfare Act of 1980 "neither confers an enforceable private right on its beneficiaries nor creates an implied cause of action on their behalf." Suter, 118 L. Ed.2d at 16. State defendants assert that the rationale applied in Suter should be

applied to the instant case, and that this Court should determine as a matter of law that Plaintiffs have no private enforceable right under Title IV-D of the Social Security Act.

This Court filed its original memorandum opinion in this case on September 18, 1991. Defendants then filed an appeal to the United States Court of Appeals for the Eighth Circuit, which was dismissed on January 28, 1992 for lack of jurisdiction. Accordingly, this Court filed its supplemental memorandum order granting Plaintiffs further relief on March 27, 1992. The Court considers any new legal developments that may affect this Court's original memorandum opinion, which held that Title IV-D does create an enforceable right in AFDC recipients and that Title IV-D does not permit the exclusion of Indian children who have absent parents living on the reservation from its benefits, a matter

for the parties and the appellant court to consider on appeal. Without ruling on the merits of the motion, it is

**ORDERED** that State defendants' Motion for Reconsideration and Dismissal is denied.

Dated August 10, 1992.

BY THE COURT:

/s/ Donald J. Porter
Senior U.S. District Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK
By /s/ Vicky J. Reinhard
Deputy

(Seal of Court)

APPENDIX G

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 7. SOCIAL SECURITY ACT
TITLE IV. GRANTS TO STATES FOR AID AND SERVICES TO NEEDY FAMILIES WITH CHILDREN AND FOR CHILD-WELFARE SERVICES

PART D. CHILD SUPPORT AND ESTABLISHMENT OF PATERNITY

**§ 651. Authorization of appropriations**

For the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part [42 USCS §§ 651 et seq.] to all children (whether or not eligible for aid under part A [42 USCS §§ 601 et seq.] for whom such assistance is requested," there is hereby authorized to be appropriated for each fiscal year a sum

sufficient to carry out the purposes of this part [42 USCS §§ 651 et seq.].

**§ 652. Duties of Secretary**

(a) Establishment of separate organizational unit; duties. The Secretary shall establish, within the Department of Health and Human Services a separate organizational unit, under the direction of a designee of the Secretary, who shall report directly to the Secretary and who shall--

(1) establish such standards for State programs for locating absent parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the absent parent's child is living as he determines to be necessary to assure that such programs will be effective; (2) establish minimum organizational and staffing requirements for State units engaged in

carrying out such programs under plans approved under this part [42 USCS §§ 651 et seq.];

(3) review and approve State plans for such programs;

(4) evaluate the implementation of State programs established pursuant to such plan, conduct such audits of State programs established under the plan approved under this part [42 USCS §§ 651 et seq.] as may be necessary to assure their conformity with the requirements of this part [42 USCS §§ 651 et seq.], and, not less often than once every three years (or not less often than annually in the case of any State to which a reduction is being applied under section 403(h)(1) [42 USCS § 603(h)(1)], or which is operating under a corrective action plan in accordance with section 403(h)(2)

[42 USCS § 603(h)(2)]), conduct a complete audit of the programs established under such plan in each State and determine for the purposes of the penalty provision of section 403(h) [42 USCS § 603(h)] whether the actual operation of such programs in each State conforms to the requirements of this part [42 USCS §§ 651 et seq.];

(5) assist States in establishing adequate reporting procedures and maintain records of the operations of programs established pursuant to this part [42 USCS §§ 651 et seq.] in each State;

(6) maintain records of all amounts collected and disbursed under programs established pursuant to the provisions of this part [42 USCS §§ 651 et seq.] and of

the costs incurred in collecting such amounts;

(7) provide technical assistance to the States to help them establish effective systems for collecting child and spousal support and establishing paternity;

(8) receive applications from States for permission to utilize the courts of the United States to enforce court orders for support against absent parents and, upon a finding that (A) another State has not undertaken to enforce the court order of the originating State against the absent parent within a reasonable time, and (B) that utilization of the Federal courts is the only reasonable method of enforcing such order, approve such applications;

(9) operate the Parent Locator Service established by section 453 [42 USCS § 653]; and

(10) not later than three months after the end of each fiscal year, beginning with the year 1977, submit to the Congress a full and complete report on all activities undertaken pursuant to the provisions of this part [42 USCS §§ 651 et seq.], which report shall include, but not be limited to, the following:

(A) total program costs and collections set forth in sufficient detail to show the cost to the States and the Federal Government, the distribution of collections to families, State and local governmental units, and the Federal Government; and an identification of the financial impact of the provisions of this part [42 USCS §§ 651 et seq.];

(B) costs and staff associated with the Office of Child Support Enforcement;

(C) the following data, with the data required under each clause being separately stated for cases where the child is receiving aid to families with dependent children (or foster care maintenance payments under part E [42 USCS §§ 670 et seq.]), cases where the child was formerly receiving such aid or payments and the State is continuing to collect support assigned to it under section 402(a)(26) or 471(a)(17) [42 USCS §§ 602(a)(26), 671(a)(17)], and all other cases under this part [42 USCS §§ 651 et seq.]

(i) the total number of cases in which a support obligation has been established in the fiscal year for which the report is submitted, and the total amount of such obligations;

(ii) the total number of cases in which a support obligation has been established, and the total amount of such obligations;

(iii) the number of cases described in clause (i) in which support was collected during such fiscal year, and the total amount of such collections;

(iv) the number of cases described in clause (ii) in

which support was collected during such fiscal year, and the total amount of such collections; and

(v) the number of child support cases filed in each State in such fiscal year, and the amount of the collections made in each State in such fiscal year, on behalf of children residing in another State or against parents residing in another State;

(D) the status of all State plans under this part [42 USCS §§ 651 et seq.] as of the end of the fiscal year last ending before the report is submitted, together with an explanation of any problems which are delaying or preventing approval

of State plans under this part [42 USCS §§ 651 et seq.];

(E) data, by State, on the use of the Federal Parent Locator Service, and the number of locate requests submitted without the absent parent's social security account number;

(F) the number of cases, by State, in which an applicant for or recipient of aid under a State plan approved under part A [42 USCS §§ 601 et seq.] has refused to cooperate in identifying and locating the absent parent and the number of cases in which refusal so to cooperate is based on good cause (as determined in accordance with the standards referred to in section

402(a)(26)(B)(ii) [42 USCS § 602(a)(26)(B)(ii)]);

(G) data, by State, on the use of Federal courts and on use of the Internal Revenue Service for collections, the number of court orders on which collections were made, the number of paternity determinations made and the number of parents located, in sufficient detail to show the cost and benefits to the States and to the Federal Government;

(H) the major problems encountered which have delayed or prevented implementation of the provisions of this part [42 USCS §§ 651 et seq.] during the fiscal year last ending prior to the submission of such report; and (I) the amount

of administrative costs which are expended in each functional category of expenditures, including establishment of paternity.

The information contained in any such report under subparagraph (A) shall specifically include (i) the total amount of child support payments collected as a result of services furnished during the fiscal year involved to individuals under section 454(6) [42 USCS § 654(6)], (ii) the cost to the States and to the Federal Government of furnishing such services to those individuals, and (iii) the extent

to which the furnishing of such services was successful in providing sufficient support to those individuals to assure that they did not require assistance under the State plan approved under part A [42 USCS §§ 601 et seq.].

(b) Certification of child support obligations to Secretary of Treasury for collection. The Secretary shall, upon the request of any State having in effect a State plan approved under this part [42 USCS §§ 651 et seq.], certify to the Secretary of the Treasury for collection pursuant to the provisions of section 6305 of the Internal Revenue Code of 1954 [26 USCS § 6305] the amount of any child support obligation (including any support obligation with respect to the parent who is living with the child and receiving aid under the State plan approved under part A [42 USCS §§ 601 et seq.]) which is assigned to such State or is

undertaken to be collected by such State pursuant to section 454(6) [42 USCS § 654(6)]. No amount may be certified for collection under this subsection except the amount of the delinquency under a court or administrative order for support and upon a showing by the State that such State has made diligent and reasonable efforts to collect such amounts utilizing its own collection mechanisms, and upon an agreement that the State will reimburse the Secretary of the Treasury for any costs involved in making the collection. All reimbursements shall be credited to the appropriation accounts which bore all or part of the costs involved in making the collections. The Secretary after consultation with the Secretary of the Treasury may, by regulation, establish criteria for accepting amounts for collection and for making certification under this subsection including

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imposing such limitations on the frequency of making such certifications under this subsection.

(c) Payments to States. The Secretary of the Treasury shall from time to time pay to each State for distribution in accordance with the provisions of section 457 [42 USCS § 657] the amount of each collection made on behalf of such State pursuant to subsection (b).

(d) Child support management information system.

(1) Except as provided in paragraph (3), the Secretary shall not approve the initial and annually updated advance automated data processing planning document, referred to in section 454(16) [42 USCS § 454(16)], unless he finds that such document, when implemented, will generally carry out the objectives of the

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management system referred to in such subsection, and such document--

(A) provides for the conduct of, and reflects the results of, requirements analysis studies, which include consideration of the program mission, functions, organization, services, constraints, and current support, of, in, or relating to, such system,

(B) contains a description of the proposed management system referred to in section 655(a)(1)(B) [42 USCS § 655(a)(1)(B)], including a description of information flows, input data, and output reports and uses,

(C) sets forth the security and interface requirements to be employed in such management system,

(D) describes the projected resource requirements for staff and other needs, and the resources available or expected to be available to meet such requirements,

(E) contains an implementation plan and backup procedures to handle possible failures,

(F) contains a summary of proposed improvement of such management system in terms of qualitative and quantitative benefits, and

(G) provides such other information as the Secretary determines under regulation is necessary.

(2)(A) The Secretary shall through the separate organizational unit established pursuant to subsection (a), on a continuing basis, review, assess, and inspect the planning, design, and

operation of, management information systems referred to in section 455(a)(1)(B) [42 USCS § 655(a)(1)(B)], with a view to determining whether, and to what extent, such systems meet and continue to meet requirements imposed under paragraph (1) and the conditions specified under section 454(16) [42 USCS § 654(16)].

(B) If the Secretary finds with respect to any statewide management information system referred to in section 455(a)(1)(B) [42 USCS § 655(a)(1)(B)] that there is a failure substantially to comply with criteria, requirements, and other undertakings, prescribed by the advance automated data processing planning document theretofore approved by the Secretary with

respect to such system, then the Secretary shall suspend his approval of such document until there is no longer any such failure of such system to comply with such criteria, requirements, and other undertakings so prescribed.

(3) The Secretary may waive any requirement of paragraph (1) or any condition specified under section 454(16) [42 USCS § 654(16)] with respect to a State if--

(A) the State demonstrates to the satisfaction of the Secretary that the State has an alternative system or systems that enable the State, for purposes of section 403(h) [42 USCS § 603(h)], to be in substantial compliance with other requirements

of this part [42 USCS §§ 651 et seq.]; and

(B) (i) the waiver meets the criteria of paragraphs (1), (2), and (3) of section 1115(c) [42 USCS § 1315(c)(1)-(3)], or

(ii) the State-provides assurances to the Secretary that steps will be taken to otherwise improve the State's child support enforcement program.

(e) Technical assistance to States. The Secretary shall provide such technical assistance to States as he determines necessary to assist States to plan, design, develop, or install and provide for the security of, the management information systems referred to in section 455(a)(1)(B) [42 USCS § 655(a)(1)(B)].

(f) Inclusion of medical support in child support orders. The Secretary shall issue regulations to require that State agencies administering the child support enforcement program under this part [42 USCS §§ 651 et seq.] petition for the inclusion of medical support as part of any child support order whenever health care coverage is available to the absent parent at a reasonable cost. Such regulation shall also provide for improved information exchange between such State agencies and the State agencies administering the State medicaid programs under title XIX [42 USCS §§ 1396 et seq.] with respect to the availability of health insurance coverage.

(g) Standards for State paternity establishment programs.

(1) A State's program under this part [42 USCS §§ 651 et seq.] shall be found, for

purposes of section 403(h) [42 USCS § 603(h)], not to have complied substantially with the requirements of this part [42 USCS §§ 651 et seq.] unless, for any fiscal year beginning on or after October 1, 1994, its paternity establishment percentage for such fiscal year is based on reliable data and (rounded to the nearest whole percentage point) equals or exceeds--

(A) 75 percent;

(B) for a State with a paternity establishment percentage of not less than 50 percent but less than 75 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 3 percentage points;

(C) for a State with a paternity establishment percentage of not less than 45 percent but less than 50 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 4 percentage points;

(D) for a State with a paternity establishment percentage of not less than 40 percent but less than 45 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 5 percentage points; or

(E) for a State with a paternity establishment percentage of less than 40 percent for such fiscal year, the paternity establishment

percentage of the State for the immediately preceding fiscal year plus 6 percentage points.

(2) For purposes of this section--

(A) the term "paternity establishment percentage" means, with respect to a State (or all States, as the case may be) for a fiscal year, the ratio (expressed as a percentage) that the total number of children--

(i) who have been born out of wedlock during the fiscal year,

(ii) (I) except as provided in the last sentence of this paragraph, with respect to whom aid is being paid under the State's plan approved under part A or E [42 USCS §§ 601 et

seq. or §§ 670 et seq.] as of the end of the fiscal year, or (II) with respect to whom services are being provided under the State's plan approved under this part or [part] E [42 USCS §§ 651 et seq. or §§ 670 et seq.] as of the end of the fiscal year pursuant to an application submitted under section 454(6) [42 USCS § 654(6)], and

(iii) the paternity of whom has been established or acknowledged during the fiscal year, bears to the total number of children who were born out of wedlock during the immediately preceding fiscal year and (except as provided in

such last sentence) with respect to whom aid was being paid under the State's plan approved under part A or E [42 USCS §§ 601 et seq. or §§ 670 et seq.] as of the end of such preceding fiscal year or with respect to whom services were being provided under the State's plan approved under this part or [part] E [42 USCS §§ 651 et seq. or §§ 670 et seq.] as of the end of such preceding fiscal year pursuant to an application submitted under section 454(6) [42 USCS § 654(6)]; and

(B) the term "reliable data" means the most recent data available which are found by the Secretary to be

reliable for purposes of this section.

For purposes of subparagraph (A), the total number of children shall not include any child who is a dependent child by reason of the death of a parent unless paternity is established for such child or any child with respect to whom an applicant or recipient is found to have good cause for refusing to cooperate under section 402(a)(26) [42 USCS § 602(a)(26)] or any child with respect to whom the State agency administering the plan under part E [42 USCS §§ 670 et seq.] determines (as provided in section 454(4)(B) [42 USCS § 654(4)(B)]) that it is against the best interests of such child to do so.

(3) (A) The requirements of this subsection are in addition to and shall

not supplant any other requirement (that is not inconsistent with such requirements) established in regulations by the Secretary for the purpose of determining (for purposes of section 403(h) [42 USCS § 603(h)]) whether the program of a State operated under this part [42 USCS § 651 et seq.] shall be treated as complying substantially with the requirements of this part [42 USCS § 651 et seq.].

(B) The Secretary may modify the requirements of this subsection to take into account such additional variables as the Secretary identifies (including the percentage of children born out-of-wedlock in a State) that affect the ability of a State to meet the requirements of this subsection.

(C) The Secretary shall submit an annual report to the Congress that sets forth the data upon which the paternity establishment percentages for States for a fiscal year are based, lists any additional variables the Secretary has identified under subparagraph (A), and describes State performance in establishing paternity.

(h) Requirement of prompt State response to requests for child support assistance. The standards required by subsection (a)(1) shall include standards establishing time limits governing the period or periods within which a State must accept and respond to requests (from States, jurisdictions thereof, or individuals who apply for services furnished by the State agency under this part [42 USCS §§ 651 et seq.] or with respect to whom an

assignment under section 402(a)(26) [42 USCS § 602(a)(26)] is in effect) for assistance in establishing and enforcing support orders, including requests to locate absent parents, establish paternity, and initiate proceedings to establish and collect child support awards.

(i) Requirement of prompt State response to requests for child support assistance. The standards required by subsection (a)(1) shall include standards establishing time limits governing the period or periods within which a State must distribute, in accordance with section 457 [42 USCS § 657], amounts collected as child support pursuant to the State's plan approved under this part [42 USCS §§ 651 et seq.].

**§ 653. Parent Locator Service**

(a) Establishment; purpose. The Secretary shall establish and conduct a Parent Locator

Service, under the direction of the designee of the Secretary referred to in section 452(a) [42 USCS § 652(a)], which shall be used to obtain and transmit to any authorized person (as defined in subsection (c)) information as to the whereabouts of any absent parent when such information is to be used to locate such parent for the purpose of enforcing support obligations against such parent.

(b) Disclosure of information to authorized persons. Upon request, filed in accordance with subsection (d) of any authorized person (as defined in subsection (c)) for the social security account number (or numbers, if the individual involved has more than one such number) and the most recent address and place of employment of any absent parent, the Secretary shall, notwithstanding any other provision of law, provide through the Parent

Locator Service such information to such person, if such information--

(1) is contained in any files or records maintained by the Secretary or by the Department of Health and Human Services; or

(2) is not contained in such files or records, but can be obtained by the Secretary, under the authority conferred by subsection (e), from any other department, agency, or instrumentality of the United States or of any State.

No information shall be disclosed to any person if the disclosure of such information would contravene the national policy or security interests of the United States or the confidentiality of census data. The Secretary shall give priority to requests made by any authorized person described in subsection (c)(1).

(c) "Authorized persons" defined. As used in subsection (a), the term "authorized person" means--

(1) any agent or attorney of any State having in effect a plan approved under this part [42 USCS §§ 651 et seq.], who has the duty or authority under such plans to seek to recover any amounts owed as child and spousal support (including, when authorized under the State plan, any official of a political subdivision);

(2) the court which has authority to issue an order against an absent parent for the support and maintenance of a child, or any agent of such court; and

(3) the resident parent, legal guardian, attorney, or agent of a child (other than a child receiving aid under part A of this title [42 USCS §§ 601 et seq.]) (as determined by regulations prescribed by

the Secretary) without regard to the existence of a court order againt an absent parent who has a duty to support and maintain any such child.

(d) Form and manner of request for information. A request for information under this section shall be filed in such manner and form as the Secretary shall by regulation prescribe and shall be accompanied or supported by such documents as the Secretary may determine to be necessary.

(e) Compliance with request; search of files and records by head of any department, etc., of United States; transmittal of information to Secretary; reimbursement for cost of search; fees.

(1) Whenever the Secretary receives a request submitted under subsection (b) which he is reasonably satisfied meets the criteria established by subsections

(a), (b), and (c), he shall promptly undertake to provide the information requested from the files and records maintained by any of the departments, agencies, or instrumentalities of the United States or of any State.

(2) Notwithstanding any other provision of law, whenever the individual who is the head of any department, agency, or instrumentality of the United States receives a request from the Secretary for information authorized to be provided by the Secretary under this section, such individual shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality with a view to determining whether the information requested is contained in any such files or records. If such search discloses the

information requested, such individual shall immediately transmit such information to the Secretary, except that if any information is obtained the disclosure of which would contravene national policy or security interests of the United States or the confidentiality of census data, such information shall not be transmitted and such individual shall immediately notify the Secretary. If such search fails to disclose the information requested, such individual shall immediately so notify the Secretary. The costs incurred by any such department, agency, or instrumentality of the United States or of any State in providing such information to the Secretary shall be reimbursed by him. Whenever such services are furnished to an individual specified in subsection

(c)(3), a fee shall be charged such individual. The fee so charged shall be used to reimburse the Secretary or his delegate for the expense of providing such services.

(3) The Secretary of Labor shall enter into an agreement with the Secretary to provide prompt access for the Secretary (in accordance with this subsection) to the wage and unemployment compensation claims information and data maintained by or for the Department of Labor or State employment security agencies.

(f) Arrangements and cooperation with State agencies. The Secretary, in carrying out his duties and functions under this section, shall enter into arrangements with State agencies administering State plans approved under this part [42 USCS §§ 651 et seq.] for such State agencies to accept from resident parents,

legal guardians, or agents of a child described in subsection (c)(3) and to transmit to the Secretary requests for information with regard to the whereabouts of absent parents and otherwise to cooperate with the Secretary in carrying out the purposes of this section.

**§ 654. State plan for child and spousal support**

A State plan for child and spousal support must--

(1) provide that it shall be in effect in all political subdivisions of the State;

(2) provide for financial participation by the State;

(3) provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation

prescribe, within the State to administer the plan;

(4) provide that such State will undertake--

(A) in the case of a child born out of wedlock with respect to whom an assignment under section 402(a)(26) or section 1912 of this title [42 USCS § 602(a)(26) or 1396k] is effective, to establish the paternity of such child, unless the agency administering the plan of the State under Part A of this title [42 USCS §§ 601 et seq.] determines in accordance with the standards prescribed by the Secretary pursuant to section 402(a)(26)(B) [42 USCS § 602(a)(26)(B)] that it is against the best interests of the child to do so, or, in the case of such a

child with respect to whom an assignment under section 1912 [42 USCS § 1396k] is in effect, the State agency administering the plan approved under title XIX [42 USCS §§ 1396 et seq.] determines pursuant to section 1912(a)(1)(B) [42 USCS § 1396k(a)(1)(B)] that it is against the best interests of the child to do so, and

(B) in the case of any child with respect to whom such assignment is effective, including an assignment with respect to a child on whose behalf a State agency is making foster care maintenance payments under part E [42 USCS §§ 670 et seq.], to secure support for such child from his parent (or from any other person legally liable for such

support) and, at the option of the State, from such parent for his spouse (or former spouse) receiving aid to families with dependent children or medical assistance under a State plan approved under title XIX [42 USCS §§ 1396 et seq.] (but only if a support obligation has been established with respect to such spouse), utilizing any reciprocal arrangements adopted with other States (unless the agency administering the plan of the State under part A or E of this title [42 USCS §§ 601 et seq., 670 et seq.] determines in accordance with the standards prescribed by the Secretary pursuant to section 402(a)(26)(B) [42 USCS 602(a)(26)(B)] that it is against

the best interests of the child to do so), except that when such arrangements and other means have proven ineffective, the State may utilize the Federal courts to obtain or enforce court orders for support;

(5) provide that (A) in any case in which support payments are collected for an individual with respect to whom an assignment under section 402(a)(26) [42 USCS § 602(a)(26)] is effective, such payments shall be made to the State for distribution pursuant to section 457 [42 USCS § 657] and shall not be paid directly to the family, and the individual will be notified on a monthly basis (or on a quarterly basis for so long as the Secretary determines with respect to a State that requiring such

notice on a monthly basis would impose an unreasonable administrative burden) of the amount of the support payments collected; except that this paragraph shall not apply to such payments for any month following the first month in which the amount collected is sufficient to make such family ineligible for assistance under the State plan approved under part A [42 USCS §§ 601 et seq.]; and (B) in case in which support payments are collected for an individual pursuant to the assignment made under section 1912 [42 USCS § 1396k], such payments shall be made to the State for distribution pursuant to section 1912 [42 USCS § 1396k], except that this clause shall not apply to such payments for any month after the month in which the individual

ceases to be eligible for medical assistance;

(6) provide that (A) the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, including support collection services for the spouse (or former spouse) with whom the absent parent's child is living (but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan), (B) an application fee for furnishing such services shall be imposed, which shall be paid by the individual applying for such services, or

recovered from the absent parent, or paid by the State out of its own funds (the payment of which from State funds shall not be considered as an administrative cost of the State for the operation of the plan, and shall be considered income to the program), the amount of which (i) will not exceed $ 25 (or such higher or lower amount (which shall be uniform for all States) as the Secretary may determine to be appropriate for any fiscal year to reflect increases or decreases in administrative costs), and (ii) may vary among such individuals on the basis of ability to pay (as determined by the State), [and] (C) a fee of not more than $ 25 may be imposed in any case where the State requests the Secretary of the Treasury to withhold past-due support owed to or on behalf of

such individual from a tax refund pursuant to section 464(a)(2) [42 USCS § 664(a)(2)], (D) a fee (in accordance with regulations of the Secretary) for performing genetic tests may be imposed on any individual who is not a recipient of aid under a State plan approved under part A [42 USCS §§ 601 et seq.], and (E) any costs in excess of the fees so imposed may be collected--

(i) from the parent who owes the child or spousal support obligation involved, or

(ii) at the option of the State, from the individual to whom such services are made available, but only if such State has in effect a procedure whereby all persons in such State having authority to order child or spousal support are

informed that such costs are to be collected from the individual to whom such services were made available;

(7) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials (A) to assist the agency administering the plan, including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the agency administering the plan;

(8) provide that the agency administering the plan will establish a service to locate absent parents utilizing--

(A) all sources of information and available records, and

(B) the Parent Locator Service in the Department of Health and Human Services;

(9) provide that the State will, in accordance with standards prescribed by the Secretary, cooperate with any other State--

(A) in establishing paternity, if necessary,

(B) in locating an absent parent residing in the State (whether or not permanently) against whom any action is being taken under a program established under a plan approved under this part [42 USCS §§ 651 et seq.] in another State,

(C) in securing compliance by an absent parent residing in such State (whether or not permanently) with an order issued by a court of competent

jurisdiction against such parent for the support and maintenance of the child or children or the parent of such child or children with respect to whom aid is being provided under the plan of such other State, and

(D) in carrying out other functions required under a plan approved under this part [42 USCS §§ 651 et seq.];

(10) provide that the State will maintain a full record of collections and disbursements made under the plan and have an adequate reporting system;

(11) provide that amounts collected as support shall be distributed as provided in section 457 [42 USCS § 657];

(12) provide that any payment required to be made under section 456 or 457 [42 USCS §§ 656, 657] to a family shall be made to the resident parent, legal guardian, or

caretaker relative having custody of or responsibility for the child or children;

(13) provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating absent parents, establishing paternity, obtaining support orders, and collecting support payments;

(14) comply with such bonding requirements, for employees who receive, disburse, handle, or have access to, cash, as the Secretary shall by regulations prescribe;

(15) maintain methods of administration which are designed to assure that persons responsible for handling cash receipts shall not participate in accounting or

operating functions which would permit them to conceal in the accounting records the misuse of cash receipts (except that the Secretary shall by regulations provide for exceptions to this requirement in the case of sparsely populated areas where the hiring of unreasonable additional staff would otherwise be necessary);

(16) provide, at the option of the State, for the establishment, in accordance with an (initial and annually updated) advance automated data processing planning document approved under section 452(d) [42 USCS § 652(d)], of a statewide automated data processing and information retrieval system designed effectively and efficiently to assist management in the administration of the State plan, in the State and localities thereof, so as (A)

to control, account for, and monitor (i) all the factors in the support enforcement collection and paternity determination process under such plan (including, but not limited to, (I) identifiable correlation factors (such as social security numbers, names, dates of birth, home addresses and mailing addresses (including postal ZIP codes) of any individual with respect to whom support obligations are sought to be established or enforced and with respect to any person to whom such support obligations are owing) to assure sufficient compatibility among the systems of different jurisdictions to permit periodic screening to determine whether such individual is paying or is obligated to pay support in more than one jurisdiction, (II) checking of records of

such individuals on a periodic basis with Federal, intra- and inter-State, and local agencies, (III) maintaining the data necessary to meet the Federal reporting requirements on a timely basis, and (IV) delinquency and enforcement activities), (ii) the collection and distribution of support payments (both intra- and inter-State), the determination, collection, and distribution of incentive payments both inter- and intra-State, and the maintenance of accounts receivable on all amounts owed, collected and distributed, and (iii) the costs of all services rendered, either directly or by interfacing with State financial management and expenditure information, (B) to provide interface with records of the State's aid to families with

dependent children program in order to determine if a collection of a support payment causes a change affecting eligibility for or the amount of aid under such program, (C) to provide for security against unauthorized access to, or use of, the data in such system, (D) to facilitate the development and improvement of the income withholding and other procedures required under section 466(a) [42 USCS § 666(a)] through the monitoring of support payments, the maintenance of accurate records regarding the payment of support, and the prompt provision of notice to appropriate officials with respect to any arrearages in support payments which may occur, and (E) to provide management information on all cases under the State plan from

initial referral or application through collection and enforcement;

(17) in the case of a State which has in effect an agreement with the Secretary entered into pursuant to section 463 [42 USCS § 663] for the use of the Parent Locator Service established under section 453 [42 USCS § 653], provide that the State will accept and transmit to the Secretary requests for information authorized under the provisions of the agreement to be furnished by such Service to authorized persons, will impose and collect (in accordance with regulations of the Secretary) a fee sufficient to cover the costs to the State and to the Secretary incurred by reason of such requests, will transmit to the Secretary from time to time (in accordance with such regulations) so much of the fees

collected as are attributable to such costs to the Secretary so incurred, and during the period that such agreement is in effect will otherwise comply with such agreement and regulations of the Secretary with respect thereto;

(18) provide that the State has in effect procedures necessary to obtain payment of past-due support from overpayments made to the Secretary of the Treasury as set forth in section 464 [42 USCS § 664], and take all steps necessary to implement and utilize such procedures;

(19) provide that the agency administering the plan--

(A) shall determine on a periodic basis, from information supplied pursuant to section 508 of the Unemployment Compensation Amendments of 1976 [29 USCS § 49b; 42 USCS §

603a], whether any individuals receiving compensation under the State's unemployment compensation law (including amounts payable pursuant to any agreement under any Federal unemployment compensation law) owe child support obligations which are being enforced by such agency, and

(B) shall enforce any such child support obligations which are owed by such an individual but are not being met--

(i) through an agreement with such individual to have specified amounts withheld from compensation otherwise payable to such individual and by submitting a copy of any such agreement to the State agency

administering the unemployment compensation law, or

(ii) in the absence of such an agreement, by bringing legal process (as defined in section 462(e) of this Act [42 USCS § 662(e)]) to require the withholding of amounts from such compensation;

(20) provide, to the extent required by section 466 [42 USCS § 666], that the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section, and (B) shall implement the procedures which are prescribed in or pursuant to such laws;

(21) (A) at the option of the State, impose a late payment fee on all overdue support (as defined in section 466(e) [42

USCS § 666(e)]) under any obligation being enforced under this part [42 USCS §§ 651 et seq.], in an amount equal to a uniform percentage determined by the State (not less than 3 percent nor more than 6 percent) of the overdue support, which shall be payable by the absent parent owing the overdue support; and

(B) assure that the fee will be collected in addition to, and only after full payment of, the overdue support, and that the imposition of the late payment fee shall not directly or indirectly result in a decrease in the amount of the support which is paid to the child (or spouse) to whom, or on whose behalf, it is owed;

(22) in order for the State to be eligible to receive any incentive

payments under section 458 [42 USCS § 658], provide that, if one or more political subdivisions of the State participate in the costs of carrying out activities under the State plan during any period, each such subdivision shall be entitled to receive an appropriate share (as determined by the State) of any such incentive payments made to the State for such period, taking into account the efficiency and effectiveness of the activities carried out under the State plan by such political subdivision;

(23) provide that the State will regularly and frequently publicize, through public service announcements, the availability of child support enforcement services under the plan and otherwise, including information as to any application fees for such services and a

telephone number or postal address at which further information may be obtained; and

(24) provide that if the State, as of the date of the enactment of this paragraph [enacted Oct. 13, 1988], does not have in effect an automated data processing and information retrieval system meeting all of the requirements of paragraph (16), the State--

(A) will submit to the Secretary by October 1, 1991, for review and approval by the Secretary within 9 months after submittal an advance automated data processing planning document of the type referred to in such paragraph; and

(B) will have in effect by October 1, 1995, an operational automated data processing and information

retrieval system, meeting all the requirements of that paragraph, which has been approved by the Secretary.

The State may allow the jurisdiction which makes the collection involved to retain any application fee under paragraph (6)(B) or any late payment fee under paragraph (21).

**§ 655. Payments to States**

(a) Amounts payable each quarter. (1) From the sums appropriated therefor, the Secretary shall pay to each State for each quarter an amount--

(A) equal to the percent specified in paragraph (2) of the total amounts expended by such State during such quarter for the operation of the plan approved under section 454 [42 USCS § 654],

(B) equal to 90 percent (rather than the percent specified in subparagraph (A)) of so much of the sums expended during such quarter as are attributable to the planning, design, development, installation or enhancement of an automatic data processing and information retrieval system (including in such sums the full cost of the hardware components of such system) which the Secretary finds meets the requirements specified in section 454(16) [42 USCS § 654(16)], or meets such requirements without regard to clause (D) thereof [42 USCS § 654(16)(D)], and

(C) equal to 90 percent (rather than the percentage specified in subparagraph (A)) of so much of the

sums expended during such quarter as are attributable to laboratory costs incurred in determining paternity; [.]

(2) The percent applicable to quarters in a fiscal year for purposes of paragraph (1)(A) is--

(A) 70 percent for fiscal years 1984, 1985, 1986, and 1987,

(B) 68 percent for fiscal years 1988 and 1989, and

(C) 66 percent for fiscal year 1990 and each fiscal year thereafter. [;]

except that no amount shall be paid to any State on account of amounts expended to carry out an agreement which it has entered into pursuant to section 463 [42 USCS § 663]. In determining the total amounts expended by any State during a

quarter, for purposes of this subsection, there shall be excluded an amount equal to the total of any fees collected or other income resulting from services provided under the plan approved under this part [42 USCS §§ 651 et seq.].

(b) Estimate of amounts payable; installment payments.

(1) Prior to the beginning of each quarter, the Secretary shall estimate the amount to which a State will be entitled under subsection (a) for such quarter, such estimates to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsection, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in

such quarter, and if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, and (B) such other investigation as the Secretary may find necessary.

(2) Subject to subsection (d), the Secretary shall then pay, in such installments as he may determine, to the State the amount so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection.

(3) Upon the making of any estimate by the Secretary under this subsection, any

appropriations available for payments under this section shall be deemed obligated.

(c) [Repealed]

(d) State reports. Notwithstanding any other provision of law, no amount shall be paid to any State under this section for any quarter, prior to the close of such quarter, unless for the period consisting of all prior quarters for which payment is authorized to be made to such State under subsection (a), there shall have been submitted by the State to the Secretary, with respect to each quarter in such period (other than the last two quarters in such period), a full and complete report (in such form and manner and containing such information as the Secretary shall prescribe or require) as to the amount of child support collected and disbursed and all expenditures

with respect to which payment is authorized under subsection (a).

(e)(1) In order to encourage and promote the development and use of more effective methods of enforcing support obligations under this part [42 USCS §§ 651 et seq.] in cases where either the children on whose behalf the support is sought or their absent parents do not reside in the State where such cases are filed, the Secretary is authorized to make grants, in such amounts and on such terms and conditions as the Secretary determines to be appropriate, to States which propose to undertake new or innovative methods of support collection in such cases and which will use the proceeds of such grants to carry out special projects designed to demonstrate and test such methods.

(2) A grant under this subsection shall be made only upon a finding by the Secretary that the project involved is likely to be of significant assistance in carrying out the purpose of this subsection; and with respect to such project the Secretary may waive any of the requirements of this part [42 USCS §§ 651 et seq.] which would otherwise be applicable, to such extent and for such period as the Secretary determines is necessary or desirable in order to enable the State to carry out the project.

(3) At the time of its application for a grant under this subsection the State shall submit to the Secretary a statement describing in reasonable detail the project for which the proceeds of the grant are to be used, and the State shall from time to time thereafter submit to

the Secretary such reports with respect to the project as the Secretary may specify.

(4) Amounts expended by a State in carrying out a special project assisted under this section shall be considered, for purposes of section 458(b) [42 USCS § 658(b)] (as amended by section 5(a) of the Child Support Enforcement Amendments of 1984), to have been expended for the operation of the State's plan approved under section 454 [42 USCS § 654].

(5) There is authorized to be appropriated the sum of $ 7,000,000 for fiscal year 1985, $ 12,000,000 for fiscal year 1986, and $ 15,000,000 for each fiscal year thereafter, to be used by the Secretary in making grants under this subsection.

**§ 656. Support obligation as obligation to State; amount; discharge in bankruptcy**

(a)(1) The support rights assigned to the State under section 402(a)(26) [42 USCS § 602(a)(26)] or secured on behalf of a child receiving foster care maintenance payments shall constitute an obligation owed to such State by the individual responsible for providing such support. Such obligation shall be deemed for collection purposes to be collectible under all applicable State and local processes.

(2) The amount of such obligation shall be--

(A) the amount specified in a court order which covers the assigned support rights, or

(B) if there is no court order, an amount determined by the State in

accordance with a formula approved by the Secretary, and

(3) Any amounts collected from an absent parent under the plan shall reduce, dollar for dollar, the amount of his obligation under subparagraphs (A) and (B) of paragraph (2).

(b) A debt which is a child support obligation assigned to a State under section 402(a)(26) [42 USCS § 602(a)(26)] is not released by a discharge in bankruptcy under title 11, United States Code [11 USCS §§ 101 et seq.].

**§ 657. Distribution of proceeds**

(a) Amount collected during fifteen month period beginning July 1, 1975. The amounts collected as child support by a State pursuant to a plan approved under this part [42 USCS §§ 651 et seq.] during the 15 months beginning July 1, 1975, shall be distributed as follows:

(1) 40 per centum of the first $ 50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without any decrease in the amount paid as assistance to such family during such month;

(2) such amounts as are collected periodically which are in excess of any amount paid to the family under paragraph (1) which represent monthly support payments shall be retained by the State to reimburse it for assistnace payments to the family during such period (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing);

(3) such amounts as are in excess of amounts retained by the State under paragraph (2) and are not in excess of

the amount required to be paid during such period th the family by a court order shall be paid to the family; and

(4) such amounts as are in excess of amounts required to be distributed under paragraphs (1), (2),a nd (3) shall be (A) retained by the State (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing) as reimbursement for any past assistance payments made to the family for which the State has not been reimbursed or (B) if no assistance payments have been made by the State which have not been repaid, such amounts shall be paid to the family.

(b) Amount collected during fifteen month period beginning July 1, 1976. The amounts collected as support by a State pursuant to a plan approved under this part [42 USCS §§ 651

et seq.] during any fiscal year beginning after September 30, 1976, shall (subject to subsection (d)) be distributed as follows:

(1) of such amounts as are collected periodically which represent monthly support payments, the first $ 50 of any payments for a month received in that month, and the first $ 50 of payments for each prior month received in that month which were made by the absent parent in the month when due, shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;

(2) such amounts as are collected periodically which are in excess of any amount paid to the family under paragraph (1) and which represent monthly support payments shall be retained by the State

to reimburse it for assistance payments to the family during such period (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing);

(3) such amounts as are in excess of amounts retained by the State under paragraph (2) and are not in excess of the amount required to be paid during such period to the family by a court or administrative order shall be paid to the family; and

(4) such amounts as are in excess of amounts required to be distributed under paragraphs (1), (2), and (3) shall be (A) retained by the State (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing) as reimbursement for any past assistance payments made to the family

for which the State has not been reimbursed or (B) if no assistance payments have been made by the State which have not been repaid, such amounts shall be paid to the family.

(c) Collection after termination of assistance; distribution of support proceeds. Whenever a family with respect to which child support enforcement services have been provided pursuant to section 454(4) [42 USCS § 654(4)] ceases to receive assistance under part A of this title [42 USCS §§ 601 et seq.], the State shall provide appropriate notice to the family and continue to provide such services, and pay any amount of support collected, subject to the same conditions and on the same basis as in the case of the individuals to whom services are furnished pursuant to section 454(6) [42 USCS § 654(6)], except that no application or other request to

continue services shall be required of a family to which this subsection applies, and the provisions of section 454(6)(B) [42 USCS § 654(6)(B)] may not be applied.

(d) Child support enforcement for certain children in foster care. Notwithstanding the preceding provisions of this section, amounts collected by a State as child support for months in any period on behalf of a child for whom a public agency is making foster care maintenance payments under part E [42 USCS §§ 670 et seq.]--

(1) shall be retained by the State to the extent necessary to reimburse it for the foster care maintenance payments made with respect to the child during such period (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing);

(2) shall be paid to the public agency responsible for supervising the placement of the child to the extent that the amounts collected exceed the foster care maintenance payments made with respect to the child during such period but not the amounts required by a court or administrative order to be paid as support on behalf of the child during such period; and the responsible agency may use the payments in the manner it determines will serve the best interests of the child, including setting such payments aside for the child's future needs or making all or a part thereof available to the person responsible for meeting the child's day-to-day needs; and

(3) shall be retained by the State, if any portion of the amounts collected

remains after making the payments required under paragraphs (1) and (2), to the extent that such portion is necessary to reimburse the State (with appropriate reimbursement to the Federal Government to the extent of its participation in the financing) for any past foster care maintenance payments (or payments of aid to families with dependent children) which were made with respect to the child (and with respect to which past collections have not previously been retained);

and any balance shall be paid to the State agency responsible for supervising the placement of the child, for use by such agency in accordance with paragraph (2).

**§ 658. Incentive payments to States**

(a) In order to encourage and reward State child support enforcement programs which

perform in a cost-effective and efficient manner to secure support for all children who have sought assistance in securing support, whether such children reside within the State or elsewhere and whether or not they are eligible for aid to families with dependent children under a State plan approved under part A of this title [42 USCS §§ 601 et seq.], and regardless of the economic circumstances of their parents, the Secretary shall, from support collected which would otherwise represent the Federal share of assistance to families of absent parents, pay to each State for each fiscal year, on a quarterly basis (as described in subsection (e)) beginning with the quarter commencing October 1, 1985, an incentive payment in an amount determined under subsection (b).

(b)(1) Except as provided in paragraphs (2), (3), and (4), the incentive payment shall be equal to--

(A) 6 percent of the total amount of support collected under the plan during the fiscal year in cases in which the support obligation involved is assigned to the State pursuant to section 402(a)(26) or section 471(a)(17) [42 USCS §§ 602(a)(26), 671(a)(17)] (with such total amount for any fiscal year being hereafter referred to in this section as the State's "AFDC collections" for that year), plus

(B) 6 percent of the total amount of support collected during the fiscal year in all other cases under this part [42 USCS §§ 651 et seq.] (with such total amount for any fiscal

year being hereafter referred to in this section as the State's "non-AFDC collections" for that year).

(2) If subsection (c) applies with respect to a State's AFDC collections or non-AFDC collections for any fiscal year, the percent specified in paragraph (1)(A) or (B) (with respect to such collections) shall be increased to the higher percent determined under such subsection (with respect to such collections) in determining the State's incentive payment under this subsection for that year.

(3) The dollar amount of the portion of the State's incentive payment for any fiscal year which is determined on the basis of its non-AFDC collections under paragraph (1)(B) (after adjustment under

subsection (c) if applicable) shall in no case exceed--

(A) the dollar amount of the portion of such payment which is determined on the basis of its AFDC collections under paragraph (1)(A) (after adjustment under subsection (c) if applicable) in the case of fiscal year 1986 or 1987;

(B) 105 percent of such dollar amount in the case of fiscal year 1988;

(C) 110 percent of such dollar amount in the case of fiscal year 1989; or

(D) 115 percent of such dollar amount in the case of fiscal year 1990 or any fiscal year thereafter.

(4) The Secretary shall make such additional payments to the State under

this part [42 USCS §§ 651 et seq.], for fiscal year 1986 or 1987, as may be necessary to assure that the total amount of payments under this section and section 455(a)(1)(A) [42 USCS § 655(a)(1)(A)] for such fiscal year is no less than 80 percent of the amount that would have been payable to that State and its political subdivisions for such fiscal year under this section and section 455(a)(1)(A) [42 USCS § 655(a)(1)(A)] if those sections (including the amendment made by section 5(c)(2)(A) of the Child Support Enforcement Amendments of 1984) had remained in effect as they were in effect for fiscal year 1985.

(c) If the total amount of a State's AFDC collections or non-AFDC collections for any fiscal year bears a ratio to the total amount

expended by the State in that year for the operation of its plan approved under section 454 [42 USCS § 654] for which payment may be made under section 455 [42 USCS § 655] (with the total amount so expended in any fiscal year being hereafter referred to in this section as the State's "combined AFDC/non-AFDC administrative costs" for that year) which is equal to or greater than 1.4, the relevant percent specified in subparagraph (A) or (B) of subsection (b)(1) (with respect to such collections) shall be increased to--

(1) 6.5 percent, plus

(2) one-half of 1 percent for each full two-tenths by which such ratio exceeds 1.4;

except that the percent so specified shall in no event be increased (for either AFDC collections or non-AFDC collections) to more than 10 percent. For purposes of the

preceding sentence, laboratory costs incurred in determining paternity in any fiscal year may at the option of the State be excluded from the State's combined AFDC/non-AFDC administrative costs for that year.

(d) In computing incentive payments under this section, support which is collected by one State at the request of another State shall be treated as having been collected in full by each such State, and any amounts expended by the State in carrying out a special project assisted under section 455(e) [42 USCS § 655(e)] shall be excluded.

(e) The amounts of the incentive payments to be made to the various States under this section for any fiscal year shall be estimated by the Secretary at or before the beginning of such year on the basis of the best information available. The Secretary shall make such payments for such year, on a quarterly basis

(with each quarterly payment being made no later than the beginning of the quarter involved), in the amounts so estimated, reduced or increased to the extent of any overpayments or underpayments which the Secretary determines were made under this section to the States involved for prior periods and with respect to which adjustment has not already been made under this subsection. Upon the making of any estimate by the Secretary under the preceding sentence, any appropriations available for payments under this section shall be deemed obligated.

**§ 659. Enforcement of individual's legal obligations to provide child support or make alimony payments**

(a) United States and District of Columbia to be subject to legal process. Notwithstanding any other provision of law (including section 207 [42 USCS § 407]), effective January 1,

1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

(b) Methods of service of legal process. Service of legal process brought for the enforcement of an individual's obligation to provide child support or make alimony payments shall be accomplished by certified or registered mail, return receipt requested, or by personal service, upon the appropriate

agent designated for receipt of such service of process pursuant to regulations promulgated pursuant to section 461 [42 USCS § 661] (or, if no agent has been designated for the governmental entity having payment responsibility for the moneys involved, then upon the head of such governmental entity). Such process shall be accompanied by sufficient data to permit prompt identification of the individual and the moneys involved.

(c) Disclosure of information in answering interrogatories; disciplinary action or civil or criminal liability or penalty prohibited. No Federal employee whose duties include responding to interrogatories pursuant to requirements imposed by section 461(b)(3) [42 USCS § 661(b)(3)] shall be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or on

account of, any disclosure of information made by him in connection with the carrying out of any of his duties which pertain (directly or indirectly) to the answering of any such interrogatory.

(d) Notice. Whenever any person, who is designated by law or regulation to accept service of process to which the United States is subject under this section, is effectively served with any such process or with interrogatories relating to an individual's child support or alimony payment obligations, such person shall respond thereto within thirty days (or within such longer period as may be prescribed by applicable State law) after the date effective service thereof is made, and shall, as soon as possible but not later than fifteen days after the date effective service is so made of any such process, send written notice that such process

has been so served (together with a copy thereof) to the individual whose moneys are affected thereby at his duty station or last-known home address.

(e) Variance in normal pay and disbursement cycles not required. Governmental entities affected by legal processes served for the enforcement of an individual's child support or alimony payment obligations shall not be required to vary their normal pay and disbursement cycles in order to comply with any such legal process.

(f) Non-liability of United States, disbursing officers, and governmental entities with respect to payments. Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular

on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

**§ 660. Civil action to enforce child support obligations; jurisdiction of district courts**

The district courts of the United States shall have jurisdiction, without regard to any amount in controversy, to hear and determine any civil action certified by the Secretary of Health and Human Services under section 452(a)(8) of this Act [42 USCS § 652(a)(8)]. A civil action under this section may be brought in any judicial district in which the claim arose, the plaintiff resides, or the defendant resides.

**§ 661. Regulations pertaining to garnishments**

(a) Authority to promulgate regulations for the implementation of the provisions of section 459 [42 USCS § 659] shall, insofar as

the provisions of such section are applicable to moneys due from (or payable by)--

(1) the executive branch of the Government (including in such branch, for the purposes of this subsection, the territories and possessions of the United States, the United States Postal Service, the Postal Rate Commission, any wholly owned Federal corporation created by an Act of Congress, and the government of the District of Columbia), be vested in the President (or his designee),

(2) the legislative branch of the Government, be vested jointly in the President pro tempore of the Senate and the Speaker of the House of Representatives (or their designees), and

(3) the judicial branch of the Government, be vested in the Chief

Justice of the United States (or his designee).

(b) Requisite content of promulgated regulations. Regulations promulgated pursuant to this section shall--

(1) in the case of those promulgated by the executive branch of the Government, include a requirement that the head of each agency thereof shall cause to be published, in the appendix of the regulations so promulgated, (A) his designation of an agent or agents to accept service of process, identified by title of position, mailing address, and telephone number, and (B) an indication of the data reasonably required in order for the agency promptly to identify the individual with respect to whose moneys the legal process is brought,

(2) in the case of regulations promulgated for the legislative and judicial branches of the Government set forth, in the appendix to the regulations so promulgated, (A) the name, position, address, and telephone number of the agent or agents who have been designated for service of process, and (B) an indication of the data reasonably required in order for such entity promptly to identify the individual with respect to whose moneys the legal process is brought, and

(3) provide that (A) in the case of regulations promulgated by the executive branch of the Government, each head of a governmental entity (or his designee) shall respond to relevant interrogatories, if authorized by the law of the State in which legal process will

issue, prior to formal issuance of such process, upon a showing of the applicant's entitlement to child support or alimony payments, and (B) in the case of regulations promulgated for the legislative and judicial branches of the Government, the person or persons designated as agents for service of process in accordance with paragraph (2) shall respond to relevant interrogatories if authorized by the law of the State in which legal process will issue, prior to formal issuance of legal process, upon a showing of the applicant's entitlement to child support or alimony payments.

(c) Priority of processes. In the event that a governmental entity, which is authorized under this section or regulations issued to carry out this section to accept service of process, pursuant to the provisions of

subsection (a), is served with more than one legal process with respect to the same moneys due or payable to any individual, then such moneys shall be available to satisfy such processes on a first-come, first-served basis, with any such process being satisfied out of such moneys as remain after the satisfaction of all such processes which have been previously served.

**§ 662. Definitions**

For purposes of section 459 [42 USCS § 659]--

(a) The term "United States" means the Federal Government of the United States, consisting of the legislative branch, the judicial branch, and the executive branch thereof, and each and every department, agency, or instrumentality of any such branch, including the United States Postal Service, the Postal Rate Commission, any wholly owned Federal corporation created by an Act of Congress, any

office, commission, bureau, or other administrative subdivision or creature thereof, and the governments of the territories and possessions of the United States.

(b) The term "child support", when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which such individual has such an obligation, and (subject to and in accordance with State law) includes but is not limited to, payments to provide for health care, education, recreation, clothing, or to meet other specific needs of such a child or children; such term also includes attorney's fees, interest, and court costs, when and to the extent that the same are expressly made recoverable as such pursuant to a decree,

order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction.

(c) The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to

his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

(d) The term "private person" means a person who does not have sovereign or other special immunity or privilege which causes such person not to be subject to legal process.

(e) The term "legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which--

(1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States, (B) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process, or (C) an authorized official pursuant to an order of such a

court of competent jurisdiction or pursuant to State or local law, and

(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments.

(f) Entitlement of an individual to any money shall be deemed to be "based upon remuneration for employment", if such money consists of--

(1) compensation paid or payable for personal services of such individual, whether such compensation is denominated as wages, salary, commission, bonus, pay, or otherwise, and includes but is not limited to, severance pay, sick pay, and

incentive pay, but does not include awards for making suggestions, or

(2) periodic benefits (including a periodic benefit as defined in section 228(h)(3) of this Act [42 USCS § 428(h)(3)]) or other payments to such individual under the insurance system established by title II of this Act [42 USCS §§ 401 et seq.] or any other system or fund established by the United States (as defined in subsection (a)) which provides for the payment of pensions, retirement or retired pay, annuities, dependents or survivors' benefits, or similar amounts payable on account of personal services performed by himself or any other individual (not including any payment as compensation for death under any Federal program, any payment under any Federal program established to

provide "black lung" benefits, any payment by the Secretary of Veterans Affairs as pension, or any payments by the Secretary of Veterans Affairs as compensation for a service-connected disability or death, except any compensation paid by the Secretary of Veterans Affairs to a former member of the Armed Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his retired pay in order to receive such compensation), and does not consist of amounts paid, by way of reimbursement or otherwise, to such individual by his employer to defray expenses incurred by such individual in carrying out duties associated with his employment.

(g) In determining the amount of any moneys due from, or payable by, the United States to

any individual, there shall be excluded amounts which--

(1) are owed by such individual to the United States,

(2) are required by law to be, and are, deducted from the remuneration or other payment involved, including but not limited to, Federal employment taxes, and fines and forfeitures ordered by court-martial,

(3) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and if amounts withheld are not greater than would be the case if such individual claimed all dependents to which he was entitled (the withholding of additional amounts pursuant to section 3402(i) of the Internal Revenue Code of 1954 [26

USCS § 3402(i)] may be permitted only when such individual presents evidence of a tax obligation which supports the additional withholding),

(4) are deducted as health insurance premiums,

(5) are deducted as normal retirement contributions (not including amounts deducted for supplementary coverage), or

(6) are deducted as normal life insurance premiums from salary or other remuneration for employment (not including amounts deducted for supplementary coverage).

**§ 663. Use of Parent Locator Service in connection with the enforcement or determination of child custody and in cases of parental kidnaping of a child**

(a) Agreements with States for use of Parent Locator Service. The Secretary shall enter

into an agreement with any State which is able and willing to do so, under which the services of the Parent Locator Service established under section 453 [42 USCS § 653] shall be made available to such State for the purpose of determining the whereabouts of any absent parent or child when such information is to be used to locate such parent or child for the purpose of--

(1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child; or

(2) making or enforcing a child custody determination.

(b) Requests from authorized persons for information. An agreement entered into under subsection (a) shall provide that the State agency described in section 454 [42 USCS § 654] will, under procedures prescribed by the Secretary in regulations, receive and transmit

to the Secretary requests from authorized persons for information as to (or useful in determining) the whereabouts of any absent parent or child when such information is to be used to locate such parent or child for the purpose of--

(1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child; or

(2) making or enforcing a child custody determination.

(c) Information which may be disclosed. Information authorized to be provided by the Secretary under subsection (a), (b), or (e) shall be subject to the same conditions with respect to disclosure as information authorized to be provided under section 453 [42 USCS § 653], and a request for information by the Secretary under this section shall be considered to be a request for information

under section 453 [42 USCS § 653] which is authorized to be provided under such section. Only information as to the most recent address and place of employment of any absent parent or child shall be provided under this section.

(d) "Custody determination" and "authorized person" defined. For purposes of this section--

(1) the term "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modification;

(2) the term "authorized person" means--

(A) any agent or attorney of any State having an agreement under this section, who has the duty or authority under the law of such

State to enforce a child custody determination;

(B) any court having jurisdiction to make or enforce such a child custody determination, or any agent of such court; and

(C) any agent or attorney of the United States, or of a State having an agreement under this section, who has the duty or authority to investigate, enforce, or bring a prosecution with respect to the unlawful taking or restraint of a child.

(e) Services of Parent Locator Service made available to Central Authority. The Secretary shall enter into an agreement with the Central Authority designated by the President in accordance with section 7 of the International Child Abduction Remedies Act [42 USCS § 11606]

under which the services of the Parent Locator Service established under section 453 [42 USCS § 653] shall be made available to such Central Authority upon its request for the purpose of locating any parent or child on behalf of an applicant to such Central Authority within the meaning of section 3(1) of that Act [42 USCS § 11602(1)]. The Parent Locator Service shall charge no fees for services requested pursuant to this subsection.

**§ 664. Collection of past-due support from Federal tax refunds**

(a) Procedures applicable; distribution.

(1) Upon receiving notice from a State agency administering a plan approved under this part [42 USCS §§ 651 et seq.] that a named individual owes past-due support which has been assigned to such State pursuant to section 402(a)(26) or 471(a)(17) [42 USCS §§ 602(a)(26),

671(a)(17)], the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, shall concurrently send notice to such individual that the withholding has been made (including in or with such notice a notification to any other person who may have filed a joint return with such individual of the steps which such other person may take in order to secure his or her proper share of the refund), and shall pay such amount to the State agency (together with notice of the

individual's home address) for distribution in accordance with section 457(b)(4) or (d)(3) [42 USCS § 657(b)(4) or (d)(3)].

(2) (A) Upon receiving notice from a State agency administering a plan approved under this part [42 USCS §§ 651 et seq.] that a named individual owes past-due support (as that term is defined for purposes of this paragraph under subsection (c)) which such State has agreed to collect under section 454(6) [42 USCS § 654(6)], and that the State agency has sent notice to such individual in accordance with paragraph (3)(A), the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a

married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to such past-due support, and shall concurrently send notice to such individual that the withholding has been made, including in or with such notice a notification to any other person who may have filed a joint return with such individual of the steps which such other person may take in order to secure his or her proper share of the refund. The Secretary of the Treasury shall pay the amount withheld to the State agency, and the State shall pay to the Secretary of the Treasury any fee imposed by the Secretary of the Treasury to cover the costs of the withholding and any required notification. The State agency shall, subject to paragraph

(3)(B), distribute such amount to or on behalf of the child to whom the support was owed.

(B) This paragraph shall apply only with respect to refunds payable under section 6402 of the Internal Revenue Code of 1954 [26 USCS § 6402] after December 31, 1985.

(3) (A) Prior to notifying the Secretary of the Treasury under paragraph (1) or (2) that an individual owes past-due support, the State shall send notice to such individual that a withholding will be made from any refund otherwise payable to such individual. The notice shall also (i) instruct the individual owing the past-due support of the steps which may be taken to contest the State's determination that past-due support is owed or the amount of the past-due

support, and (ii) provide information, as may be prescribed by the Secretary of Health and Human Services by regulation in consultation with the Secretary of the Treasury, with respect to procedures to be followed, in the case of a joint return, to protect the share of the refund which may be payable to another person.

(B) If the Secretary of the Treasury determines that an amount should be withheld under paragraph (1) or (2), and that the refund from which it should be withheld is based upon a joint return, the Secretary of the Treasury shall notify the State that the withholding is being made from a refund based upon a joint return, and shall furnish to the State the names and addresses of each taxpayer

filing such joint return. In the case of a withholding under paragraph (2), the State may delay distribution of the amount withheld until the State has been notified by the Secretary of the Treasury that the other person filing the joint return has received his or her proper share of the refund, but such delay may not exceed six months.

(C) If the other person filing the joint return with the named individual owing the past-due support takes appropriate action to secure his or her proper share of a refund from which a withholding was made under paragraph (1) or (2), the Secretary of the Treasury shall pay such share to such other person. The Secretary of the Treasury shall

deduct the amount of such payment from amounts subsequently payable to the State agency to which the amount originally withheld from such refund was paid.

(D) In any case in which an amount was withheld under paragraph (1) or (2) and paid to a State, and the State subsequently determines that the amount certified as past-due support was in excess of the amount actually owed at the time the amount withheld is to be distributed to or on behalf of the child, the State shall pay the excess amount withheld to the named individual thought to have owed the past-due support (or, in the case of amounts withheld on the basis of a joint return, jointly to the parties filing such return).

(b) Regulations; contents, etc.

(1) The Secretary of the Treasury shall issue regulations, approved by the Secretary of Health and Human Services, prescribing the time or times at which states must submit notices of past-due support, the manner in which such notices must be submitted, and the necessary information that must be contained in or accompany the notices. The regulations shall be consistent with the provisions of subsection (a)(3), shall specify the minimum amount of past-due support to which the offset procedure established by subsection (a) may be applied, and the fee that a State must pay to reimburse the Secretary of the Treasury for the full cost of applying the offset procedure, and shall provide that the Secretary of the Treasury will advise the

Secretary of Health and Human Services, not less frequently than annually, of the States which have furnished notices of past-due support under subsection (a), the number of cases in each State with respect to which such notices have been furnished, the amount of support sought to be collected under this subsection by each State, and the amount of such collections actually made in the case of each State. Any fee paid to the Secretary of the Treasury pursuant to this subsection may be used to reimburse appropriations which bore all or part of the cost of applying such procedure.

(2) In the case of withholdings made under subsection (a)(2), the regulations promulgated pursuant to this subsection shall include the following requirements:

(A) The withholding shall apply only in the case where the State determines that the amount of the past-due support which will be owed at the time the withholding is to be made, based upon the pattern of payment of support and other enforcement actions being pursued to collect the past-due support, is equal to or greater than $ 500. The State may limit the $ 500 threshold amount to amounts of past-due support accrued since the time that the State first began to enforce the child support order involved under the State plan, and may limit the application of the withholding to past-due support accrued since such time.

(B) The fee which the Secretary of the Treasury may impose to cover the costs of the withholding and notification may not exceed $ 25 per case submitted.

(c) "Past-due support" defined.

(1) Except as provided in paragraph (2), as used in this part [42 USCS §§ 651 et seq.] the term "past-due support" means the amount of a delinquency, determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a child, or of a child and the parent with whom the child is living.

(2) For purposes of subsection (a)(2), the term "past-due support" means only past-due support owed to or on behalf of a qualified child (or a qualified child and the parent with whom the child is

living if the same support order includes support for the child and the parent).

(3) For purposes of paragraph (2), the term "qualified child" means a child--

(A) who is a minor; or

(B) (i) who, while a minor, was determined to be disabled under title II or XVI [42 USCS §§ 401 et seq. or 1381 et seq.]; and

(ii) for whom an order of support is in force.

**§ 665. Allotments from pay for child and spousal support owed by members of the uniformed services on active duty**

(a) Mandatory allotment; notice upon failure to make; amount of allotment; adjustment or discontinuance; consultation.

(1) In any case in which child support payments or child and spousal support payments are owed by a member of one of

the uniformed services (as defined in section 101(3) of title 37, United States Code [37 USCS § 101(3)]) on active duty, such member shall be required to make allotments from his pay and allowances (under chapter 13 of title 37, United States Code [37 USCS §§ 701 et seq.]) as payment of such support, when he has failed to make periodic payments under a support order that meets the criteria specified in section 303(b)(1)(A) of the Consumer Credit Protection Act (15 U.S.C. 1673(b)(1)(A)) [15 USCS § 1673(b)(1)(A)] and the resulting delinquency in such payments is in a total amount equal to the support payable for two months or longer. Failure to make such payments shall be established by notice from an authorized person (as defined in subsection (b)) to the designated

official in the appropriate uniformed service. Such notice (which shall in turn be given to the affected member) shall also specify the person to whom the allotment is to be payable. The amount of the allotment shall be the amount necessary to comply with the order (which, if the order so provides, may include arrearages as well as amounts for current support), except that the amount of the allotment, together with any other amounts withheld for support from the wages of the member, as a percentage of his pay from the uniformed service, shall not exceed the limits prescribed in sections [section] 303(b) and (c) of the Consumer Credit Protection Act (15 U.S.C. 1673(b) and (c)) [15 USCS § 1673(b), (c)]. An allotment under this subsection

shall be adjusted or discontinued upon notice from the authorized person.

(2) Notwithstanding the preceding provisions of this subsection, no action shall be taken to require an allotment from the pay and allowances of any member of one of the uniformed services under such provisions (A) until such member has had a consultation with a judge advocate of the service involved (as defined in section 801(13) of title 10, United States Code [10 USCS § 801(13)]), or with a law specialist (as defined in section 801(11) of such title [10 USCS § 801(11)]) in the case of the Coast Guard, or with a legal officer designated by the Secretary concerned (as defined in section 101(5) of title 37, United States Code [37 USCS § 101(5)]) in any other case, in person, to discuss the legal and

other factors involved with respect to the member's support obligation and his failure to make payments thereon, or (B) until 30 days have elapsed after the notice described in the second sentence of paragraph (1) is given to the affected member in any case where it has not been possible, despite continuing good faith efforts, to arrange such a consultation.

(b) "Authorized person" defined. For purposes of this section the term "authorized person" with respect to any member of the uniformed services means--

(1) any agent or attorney of a State having in effect a plan approved under this part [42 USCS §§ 651 et seq.] who has the duty or authority under such plan to seek to recover any amounts owed by such member as child or child and spousal support (including, when authorized under

the State plan, any official of a political subdivision); and

(2) the court which has authority to issue an order against such member for the support and maintenance of a child, or any agent of such court.

(c) Regulations. The Secretary of Defense, in the case of the Army, Navy, Air Force, and Marine Corps, and the Secretary concerned (as defined in section 101(5) of title 37, United States Code [37 USCS § 101(5)]) in the case of each of the other uniformed services, shall each issue regulations applicable to allotments to be made under this section, designating the officials to whom notice of failure to make support payments, or notice to discontinue or adjust an allotment, should be given, prescribing the form and content of the notice and specifying any other rules

necessary for such Secretary to implement this section.

**§ 666. Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement**

(a) In order to satisfy section 454(20)(A) [42 USCS § 654(20)(A), each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part [42 USCS §§ 651 et seq.]:

(1) Procedures described in subsection (b) for the withholding from income of amounts payable as support.

(2) Procedures under which expedited processes (determined in accordance with regulations of the Secretary) are in effect under the State judicial system or

under State administrative processes (A) for obtaining and enforcing support orders, and (B) for establishing paternity. The Secretary may waive the provisions of this paragraph with respect to one or more political subdivisions within the State on the basis of the effectiveness and timeliness of support order issuance and enforcement or paternity establishment within the political subdivision (in accordance with the general rule for exemptions under subsection (d)).

(3) Procedures under which the State child support enforcement agency shall request, and the State shall provide, that for the purpose of enforcing a support order under any State plan approved under this part [42 USCS §§ 651 et seq.]--

(A) any refund of State income tax which would otherwise be payable to an absent parent will be reduced, after notice has been sent to that absent parent of the proposed reduction and the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State), by the amount of any overdue support owed by such absent parent;

(B) the amount by which such refund is reduced shall be distributed in accordance with section 457(b)(4) or (d)(3) [42 USCS § 657(b)(4) or (d)(3)] in the case of overdue support assigned to a State pursuant to section 402(a)(26) or 471(a)(17) [42 USCS §§ 602(a)(26) or 671(a)(17)], or, in the case of

overdue support which a State has agreed to collect under section 454(6) [42 USCS § 654(6)], shall be distributed, after deduction of any fees imposed by the State to cover the costs of collection, to the child or parent to whom such support is owed; and

(C) notice of the absent parent's social security account number (or numbers, if he has more than one such number) and home address shall be furnished to the State agency requesting the refund offset, and to the State agency enforcing the order.

(4) Procedures under which liens are imposed against real and personal property for amounts of overdue support

owed by an absent parent who resides or owns property in the State.

(5) (A) (i) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

(ii) As of August 16, 1984, the requirement of clause (i) shall also apply to any child for whom paternity has not yet been established and any child for whom a paternity action was brought but dismissed because a statute of limitations of less than 18 years was then in effect in the State.

(B) Procedures under which the State is required (except in cases where the individual involved has been found under section 402(a)(26)(B)

[42 USCS § 602(a)(26)(B)] to have good cause for refusing to cooperate) to require the child and all other parties, in a contested paternity case, to submit to genetic tests upon the request of any such party.

(C) Procedures for a simple civil process for voluntarily acknowledging paternity under which the State must provide that the rights and responsibilities of acknowledging paternity are explained and ensure that due process safeguards are afforded. Such procedures must include a hospital-based program for the voluntary acknowledgment of paternity during the period

immediately before or after the birth of a child.

(D) Procedures under which the voluntary acknowledgment of paternity creates a rebuttable, or at the option of the State, conclusive presumption of paternity, and under which such voluntary acknowledgment is admissible as evidence of paternity.

(E) Procedures under which the voluntary acknowledgment of paternity must be recognized as a basis for seeking a support order without requiring any further proceedings to establish paternity.

(F) Procedures which provide that (i) any objection to genetic testing results must be made in writing within a specified number of days

before any hearing at which such results may be introduced into evidence, and (ii) if no objection is made, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy.

(G) Procedures which create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.

(H) Procedures requiring a default order to be entered in a paternity case upon a showing of service of process on the defendent and any

additional showing required by State law.

(6) Procedures which require that an absent parent give security, post a bond, or give some other guarantee to secure payment of overdue support, after notice has been sent to such absent parent of the proposed action and of the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State).

(7) Procedures by which information regarding the amount of overdue support owed by an absent parent residing in the State will be made available to any consumer reporting agency (as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))) upon the request of such agency; except that (A) if the amount of the overdue support

involved in any case is less than $ 1,000, information regarding such amount shall be made available only at the option of the State, (B) any information with respect to an absent parent shall be made available under such procedures only after notice has been sent to such absent parent of the proposed action, and such absent parent has been given a reasonable opportunity to contest the accuracy of such information (and after full compliance with all procedural due process requirements of the State), and (C) a fee for furnishing such information, in an amount not exceeding the actual cost thereof, may be imposed on the requesting agency by the State.

(8) Procedures under which all child support orders which are issued or

modified in the State will include provision for withholding from wages, in order to assure that withholding as a means of collecting child support is available if arrearages occur without the necessity of filing application for services under this part [42 USCS §§ 651 et seq.].

(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due)--

(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced,

(B) entitled as a judgment to full faith and credit in such State and in any other State, and

(C) not subject to retroactive modification by such State or by any other State;

except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

(10) (A) Procedures to ensure that, beginning 2 years after the date of the enactment of this paragraph, if the State determines (pursuant to a plan indicating how and when child support orders in

effect in the State are to be periodically reviewed and adjusted) that a child support order being enforced under this part [42 USCS §§ 651 et seq.] should be reviewed, the State must, at the request of either parent subject to the order, or of a State child support enforcement agency, initiate a review of such order, and adjust such order, as appropriate, in accordance with the guidelines established pursuant to section 467(a) [this section].

(B) Procedures to ensure that, beginning 5 years after the date of the enactment of this paragraph or such earlier date as the State may select, the State must implement a process for the periodic review and adjustment of child support orders being enforced under this part [42

USCS §§ 651 et seq.] under which the order is to be reviewed not later than 36 months after the establishment of the order or the most recent review, and adjusted, as appropriate, in accordance with the guidelines established pursuant to section 467(a) [42 USCS § 667(a)], unless--

(i) in the case of an order with respect to an individual with respect to whom an assignment under section 402(a)(26) [42 USCS § 602(a)(26)] is in effect, the State has determined, in accordance with regulations of the Secretary, that such a review would not be in the best interests of the child and

neither parent has requested review; and

(ii) in the case of any other order being enforced under this part [42 USCS §§ 651 et seq.], neither parent has requested review.

(C) Procedures to ensure that the State notifies each parent subject to a child support order in effect in the State that is being enforced under this part [42 USCS §§ 651 et seq.]--

(i) of any review of such order, at least 30 days before the commencement of such review; and

(ii) of the right of such parent under subparagraph (B)

to request the State to review such order; and

(iii) of a proposed adjustment (or determination that there should be no change) in the child support award amount, and such parent is afforded not less than 30 days after such notification to initiate proceedings to challenge such adjustment (or determination).

(11) Procedures under which a State must give full faith and credit to a determination of paternity made by any other State, whether established through voluntary acknowledgment or through administrative or judicial processes.

Notwithstanding section 454(20)(B) [42 USCS § 654(20)(B)], the procedures which are required under paragraphs (3), (4),

(6), and (7) need not be used or applied in cases where the State determines (using guidelines which are generally available within the State and which take into account the payment record of the absent parent, the availability of other remedies, and other relevant considerations) that such use or application would not carry out the purposes of this part [42 USCS §§ 651 et seq.] or would be otherwise inappropriate in the circumstances.

(b) The procedures referred to in subsection (a)(1) (relating to the withholding from income of amounts payable as support) must provide for the following:

(1) In the case of each absent parent against whom a support order is or has been issued or modified in the State, and is being enforced under the State plan,

so much of such parent's wages (as defined by the State for purposes of this section) must be withheld, in accordance with the succeeding provisions of this subsection, as is necessary to comply with the order and provide for the payment of any fee to the employer which may be required under paragraph (6)(A), up to the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act (15 U.S.C. 1673(b)) [15 USCS § 1673(b)]. If there are arrearages to be collected, amounts withheld to satisfy such arrearages, when added to the amounts withheld to pay current support and provide for the fee, may not exceed the limit permitted under such section 303(b) [15 USCS § 1673(b), but the State need not withhold up to the

maximum amount permitted under such section in order to satisfy arrearages.

(2) Such withholding must be provided without the necessity of any application therefor in the case of a child (whether or not eligible for aid under part A [42 USCS §§ 601 et seq.]) with respect to whom services are already being provided under the State plan under this part [42 USCS §§ 651 et seq.], and must be provided in accordance with this subsection on the basis of an application for services under the State plan in the case of any other child in whose behalf a support order has been issued or modified in the State. In either case such withholding must occur without the need for any amendment to the support order involved or for any further action (other than those actions required under this

part [42 USCS §§ 651 et seq.]) by the court or other entity which issued such order.

(3) (A) The wages of an absent parent shall be subject to such withholding, regardless of whether support payments by such parent are in arrears, in the case of a support order being enforced under this part that is issued or modified on or after the first day of the 25th month beginning after the date of the enactment of this paragraph [enacted Oct. 13, 1988], on the effective date of the order; except that such wages shall not be subject to such withholding under this subparagraph in any case where (i) one of the parties demonstrates, and the court (or administrative process) finds, that there is good cause not to require immediate income withholding, or (ii) a

written agreement is reached between both parties which provides for an alternative arrangement.

(B) The wages of an absent parent shall become subject to such withholding, in the case of wages not subject to withholding under subparagraph (A), on the date on which the payments which the absent parent has failed to make under a support order are at least equal to the support payable for one month or, if earlier, and without regard to whether there is an arrearage, the earliest of--

(i) the date as of which the absent parent requests that such withholding begin,

(ii) the date as of which the custodial parent requests that

such withholding begin, if the State determines, in accordance with such procedures and standards as it may establish, that the request should be approved, or

(iii) such earlier date as the State may select.

(4) (A) Such withholding must be carried out in full compliance with all procedural due process requirements of the State, and (subject to subparagraph (B)) the State must send advance notice to each absent parent to whom paragraph (1) applies regarding the proposed withholding and the procedures such absent parent should follow if he or she desires to contest such withholding on the grounds that withholding (including the amount to be withheld) is not proper

in the case involved because of mistakes of fact. If the absent parent contests such withholding on those grounds, the State shall determine whether such withholding will actually occur, shall (within no more than 45 days after the provision of such advance notice) inform such parent of whether or not withholding will occur and (if so) of the date on which it is to begin, and shall furnish such parent with the information contained in any notice given to the employer under paragraph (6)(A) with respect to such withholding.

(B) The requirement of advance notice set forth in the first sentence of subparagraph (A) shall not apply in the case of any State which has a system of income withholding for child support

purposes in effect on the date of the enactment of this section [enacted Aug. 16, 1984] if such system provides on that date, and continues to provide, such procedures as may be necessary to meet the procedural due process requirements of State law.

(5) Such withholding must be administered by a public agency designated by the State, and the amounts withheld must be expeditiously distributed by the State or such agency in accordance with section 457 [42 USCS § 657] under procedures (specified by the State) adequate to document payments of support and to track and monitor such payments, except that the State may establish or permit the establishment of alternative procedures for the collection and distribution of

such amounts (under the supervision of such public agency) otherwise than through such public agency so long as the entity making such collection and distribution is publicly accountable for its actions taken in carrying out such procedures, and so long as such procedures will assure prompt distribution, provide for the keeping of adequate records to document payments of support, and permit the tracking and monitoring of such payments.

(6) (A) (i) The employer of any absent parent to whom paragraph (1) applies, upon being given notice as described in clause (ii), must be required to withhold from such absent parent's wages the amount specified by such notice (which may include a fee, established by the State, to be paid to the employer unless

waived by such employer) and pay such amount (after deducting and retaining any portion thereof which represents the fee so established) to the appropriate agency (or other entity authorized to collect the amounts withheld under the alternative procedures described in paragraph (5)) for distribution in accordance with section 457 [42 USCS § 657].

(ii) The notice given to the employer shall contain only such information as may be necessary for the employer to comply with the withholding order.

(B) Methods must be established by the State to simplify the withholding process for employers to the greatest extent possible,

including permitting any employer to combine all withheld amounts into a single payment to each appropriate agency or entity (with the portion thereof which is attributable to each individual employee being separately designated).

(C) The employer must be held liable to the State for any amount which such employer fails to withhold from wages due an employee following receipt by such employer of proper notice under subparagraph (A), but such employer shall not be required to vary the normal pay and disbursement cycles in order to comply with this paragraph.

(D) Provision must be made for the imposition of a fine against any employer who discharges from

employment, refuses to employ, or takes disciplinary action against any absent parent subject to wage withholding required by this subsection because of the existence of such withholding and the obligations or additional obligations which it imposes upon the employer.

(7) Support collection under this subsection must be given priority over any other legal process under State law against the same wages.

(8) The State may take such actions as may be necessary to extend its system of withholding under this subsection so that such system will include withholding from forms of income other than wages, in order to assure that child support owed by absent parents in the State will be

collected without regard to the types of such absent parents' income or the nature of their income-producing activities.

(9) The State must extend its withholding system under this subsection so that such system will include withholding from income derived within such State in cases where the applicable support orders were issued in other States, in order to assure that child support owed by absent parents in such State or any other State will be collected without regard to the residence of the child for whom the support is payable or of such child's custodial parent.

(10) Provision must be made for terminating withholding.

(c) Any State may at its option, under its plan approved under section 454 [42 USCS § 654], establish procedures under which support

payments under this part [42 USCS §§ 651 et seq.] will be made through the State agency or other entity which administers the State's income withholding system in any case where either the absent parent or the custodial parent requests it, even though no arrearages in child support payments are involved and no income withholding procedures have been instituted; but in any such case an annual fee for handling and processing such payments, in an amount not exceeding the actual costs incurred by the State in connection therewith or $ 25, whichever is less, shall be imposed on the requesting parent by the State.

(d) If a State demonstrates to the satisfaction of the Secretary, through the presentation to the Secretary of such data pertaining to caseloads, processing times, administrative costs, and average support

collections, and such other data or estimates as the Secretary may specify, that the enactment of any law or the use of any procedure or procedures requires by or pursuant to this section will not increase the effectiveness and efficiency of the State child support enforcement program, the Secretary may exempt the State, subject to the Secretary's continuing review and to termination of the exemption should circumstances change, from the requirement to enact the law or use the procedure or procedures involved.

(e) For purposes of this section, the term "overdue support" means the amount of a delinquency pursuant to an obligation determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a minor child which is owed to or on behalf of

such child, or for support and maintenance of the absent parent's spouse (or former spouse) with whom the child is living if and to the extent that spousal support (with respect to such spouse or former spouse) would be included for purposes of paragraph (4) or (6) of section 454 [42 USCS § 654(4) or (6)]. At the option of the State, overdue support may include amounts which otherwise meet the definition in the first sentence of this subsection but which are owed to or on behalf of a child who is not a minor child. The option to include support owed to children who are not minors shall apply independently to each procedure specified under this section.

**§ 667. State guidelines for child support awards**

(a) Each State, as a condition for having its State plan approved under this part [42 USCS §§ 651 et seq.] must establish guidelines for

child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

(b)(1) The guidelines established pursuant to subsection (a) shall be made available to all judges and other officials who have the power to determine child support awards within such State.

(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific

finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

(c) The Secretary shall furnish technical assistance to the States for establishing the guidelines, and each State shall furnish the Secretary with copies of its guidelines.

**§ 668. Encouragement of States to adopt simple civil process for voluntarily acknowledging paternity and a civil procedure for establishing paternity in contested cases**

In the administration of the child support enforcement program under this part [42 USCS §§ 651 et seq.], each State is encouraged to establish and implement a simple civil process for voluntarily acknowledging paternity and a

civil procedure for establishing paternity in contested cases.

**§ 669. Collection and reporting of child support enforcement data**

(a) The Secretary of Health and Human Services shall collect and maintain, on a fiscal year basis, up-to-date statistics, by State, with respect to each of the services specified in subsection (b) (separately stated in the case of each such service for families receiving aid under plans approved under part A [42 USCS §§ 601 et seq.] and for families not receiving such aid), on--

(1) the number of cases in the child support enforcement agency caseload under part D [42 USCS §§ 651 et seq.] which need the service involved; and

(2) the number of such cases in which the service has actually been provided.

(b) The services referred to in subsection (a) are--

(1) paternity determination;

(2) location of an absent parent for the purpose of establishing a child support obligation;

(3) establishment of a child support obligation; and

(4) location of an absent parent for the purpose of enforcing or modifying an established child support obligation.

(c) For purposes of subsection (a)(2), a service has actually been provided when the task described by the service has been accomplished.

Supreme Court, U.S.
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No. 93-1288

In The

# Supreme Court of the United States

October Term, 1993

JAMES ELLENBECKER, in his capacity as Secretary of the South Dakota Department of Social Services, TERRY WALTER, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement,

*Petitioners,*

v.

VELDA HOWE, THERESA TAKEN ALIVE, on behalf of themselves, their children, and all others similarly situated,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

WHETHER A STATE'S WHOLESALE DENIAL OF SERVICES MANDATED UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT, IN VIOLATION OF FEDERAL LAW, CAN BE REMEDIED THROUGH A PRIVATE ACTION BROUGHT PURSUANT TO 42 U.S.C. 1983 WHEN NO OTHER ALTERNATIVE ENFORCEMENT MECHANISM IS AVAILABLE?

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*Petitioners,*

v.

VELDA HOWE, THERESA TAKEN ALIVE, on behalf of themselves, their children, and all others similarly situated,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION

Respondents Velda Howe and Theresa Taken Alive respectfully request that this Court deny the Petitioners' request that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit to review that Court's decision of October 13, 1993 in this matter.

## OPINIONS BELOW

The Petitioners have included the opinions of the District Court for the District of South Dakota and the United States Court of Appeals for the Eighth Circuit in their appendix submitted with their petition. It should be noted that the Secretary of the Health and Human Services was a defendant in the district court action, but she chose not to appeal the orders from the district court directed to her.

## JURISDICTIONAL STATEMENT

The Respondents concur with the jurisdictional statement of the Petitioners.

## STATEMENT OF THE CASE

The Respondents agree that the Petitioners have adequately set out the statutory basis for this case. The factual background set out by the Petitioners, however, needs to be clarified in several respects.

The Respondents asserted in the District Court that the Petitioners failed to adequately provide for the delivery of child support enforcement services to Indian children whose absent parents resided on the nine South Dakota Indian reservations in their Title IV-D plan. The evidence elicited at trial indicated that there were at least 5175 child support enforcement cases which the Petitioners simply closed out without pursuing a support obligation because the absent parent resided in Indian

country. In those cases the Petitioners failed to utilize the various tribal courts in South Dakota nor did they make an attempt to enter into any type of cooperative agreement with the various Indian tribes in South Dakota for the delivery of services to the Respondents.

The Respondents also sued the federal Secretary of Health and Human Services under the Administrative Procedures Act, 5 U.S.C. § 702, claiming that he had failed to properly monitor the Petitioners' compliance with Title IV-D and that his policies with respect to Title IV-D cases in Indian country did not comport with the statutory mandates of Title IV-D and its implementing regulations.

The plights of Respondents Howe and Taken Alive exemplified the predicament facing certain parents of Indian children when they attempted to obtain services from the Petitioners. Absent parents residing outside of Indian country, both Indian and non-Indian, were actively pursued by the Petitioners through legal proceedings commenced in both administrative tribunals and the Circuit Courts of South Dakota by States' Attorneys or Special Attorney Generals for the State. In those cases when a party would request genetic blood testing in state court the Petitioners would arrange for and pay for those tests.

In the cases of the Respondents, however, the Petitioners, with the exception of some informal attempts to have absent parents in Indian country acknowledge paternity and pay support, took little or no action to establish paternity and support orders despite the availability of tribal courts to obtain support orders. Some of

the Respondents even had their AFDC benefits terminated because they failed to commence child support actions *pro se*. Even when one of the Respondents would commence a *pro se* action in the appropriate tribal court the Petitioners would not pay for the genetic blood testing in the tribal court leaving the case at a standstill.

In South Dakota alone of the 23,000 absent parents the Petitioners were pursuing for child support 5171 were reservation-domiciled Indians. Yet in 1990 the Petitioners collected $12,400,000.00 from child support obligors but only $12,111.90 of that was collected from reservation-domiciled Indians through the utilization of tribal courts by the Respondents without the aid of Petitioners.

The Petitioners, at pages 18-19 of their petition, assert that they were in total compliance with the federal Secretary's policies governing the delivery of Title IV-D services to the Respondents. **Those policies, however, were struck down by the District Court in its September 18, 1991 memorandum decision, App. 65-68, as violative of Title IV-D.**[1] That decision was not appealed by the federal Secretary, nor were any of the orders requiring the federal Secretary to assure that the Petitioners provide services to the Respondents, App. 101-103.

[1] The District Court also found that the Secretary's position in the litigation below was not substantially justified and therefore assessed attorney's fees against the Secretary under 28 U.S.C. § 2412(d).

## REASONS FOR DENYING THE WRIT

### 1. BECAUSE THE FEDERAL SECRETARY, WHO IS UNDER AN ORDER FROM THE DISTRICT COURT BELOW TO ENSURE THE PETITIONERS' DELIVERY OF TITLE IV-D SERVICES TO RESPONDENTS, IS NOT A PARTY TO THIS PETITION THE GRANT OF CERTIORARI WOULD BE IMPRUDENT

This Court should not grant the petition for a writ of certiorari because review by this Court would not be dispositive of the litigation below. In such a circumstance the granting of certiorari would be imprudent because this Court would be opining on a legal question, whether Title IV-D can be enforced through a 1983 action, the answer to which would not relieve the Petitioners of their obligation to comply with the District Court orders below. *See, Phillips v. New York,* 362 U.S. 456 (1960).

The Petitioners must operate their Title IV-D program in compliance with federal laws and regulations which are promulgated by the federal Secretary of Health and Human Services. *See,* 42 U.S.C. § 654(4). In the proceedings below the federal district court invalidated one of the federal Secretary's policies regarding the delivery of Title IV-D services to Respondents and ordered the Secretary and Petitioners to attempt to negotiate cooperative agreements with Indian Tribes in South Dakota without mandating that the Tribes enact the full panoply of laws required to be enacted by a State which opts to operate a Title IV-D program. App. 101-103. That order was appealed by the federal Secretary, but the appeal was subsequently abandoned. Because of that the Secretary is

under a court-imposed obligation to require the Petitioners to provide Title IV-D services to the Respondents through the negotiation of cooperative agreements under the terms stated by the district court.

The remedy ordered by the district court will have to be implemented by the Petitioners, in accordance with 42 U.S.C. § 654(4), notwithstanding any ruling from this Court on the availability of a 1983 remedy for a Title IV-D violation. Petitioners are essentially requesting that this Court find that no privately enforceable right exists in the Title IV-D arena for the sake of future litigation and not to relieve them from liability in complying with the district court's orders in this case. This would be tantamount to an advisory opinion which this Court frowns upon. *Ashcroft v. Mattis,* 431 U.S. 171, 97 S.Ct. 1739, 52 L.Ed.2d 219 (1977).

The petition should be denied as the resolution of the issue presented by the petition would serve no purpose in this case.

## 2. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DECISION IN THIS CASE COMPORTS WITH *SUTER V. ARTIST M.* AND DOES NOT CREATE AN IRRECONCILABLE CONFLICT WITH OTHER CIRCUIT COURT DECISIONS

The challenge to the Petitioners' operation of their Title IV-D program, mounted by the Respondents in the Courts below, qualitatively differs from the litigation commenced by the Plaintiffs in *Suter v. Artist M.*, 503 U.S. ___, 112 S.Ct. 1360 (1992). In *Suter* parents of abused or

neglected children claimed that they had a right to sue Illinois officials, under 42 U.S.C. § 1983, for their alleged failure to exercise reasonable efforts in reuniting families as required by the Adoption Assistance and Child Welfare Act. *See,* 42 U.S.C. § 671(a)(15). This Court noted that Illinois, in its compliance plan submitted to the federal Secretary of Health and Human Services, provided for the utilization of reasonable efforts to reunite children with their families. The term, "reasonable efforts", was not sufficiently fleshed out by the statute and implementing regulations to apprise states of what standards they would be subjected to in judging their compliance with the mandate. This Court therefore held that a private litigant should not be entitled to utilize 1983 to enforce amorphous precepts which were not "unambiguously" created in the statute. *Suter,* 112 S.Ct. 1366-67.

Conversely, this case involves a challenge to a State's failure to provide in its compliance plan for the provision of Title IV-D services to a large segment of the South Dakota population. This would be equivalent, in the *Suter* scenario, to the State of Illinois not providing for reasonable efforts to reunite a large percentage of the children it maintained in foster care with their families in its state compliance plan. Such an omission would clearly be cognizable under 42 U.S.C. § 1983. *See, Stowell v. Ives,* 976 F.2d 65 (1st Cir. 1992); *Clifton v. Schaefer,* 696 F.2d 278, 285 (7th Cir. 1992) (*Suter* stands for the proposition that a party cannot challenge the manner by which a state is implementing a plan approved by the Secretary under 1983 but can challenge the inadequacy of the plan itself.)

The Petitioner's attempt to fall under the cloak of the *Suter* ruling by contending that it was, at all relevant

times, in compliance with the federal Secretary's policies regarding the delivery of Title IV-D services is a *non sequitur.* The Secretary's policies themselves were violative of Title IV-D; the state plan the petitioners had in place was, as a result, necessarily defective because it was grounded upon faulty federal policy.

This Court in *Suter* expressed no intention to repudiate this Court's previous rulings in *Wilder v. Virginia Hospital Association,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) and *Wright v. City of Roanoke Redevelopment Authority,* 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987). *Suter,* at 1367. The Petitioners would have this Court conclude that 1983 is never available to a litigant to remedy an alleged violation of a federal entitlement program, enacted pursuant to Congress' spending powers, if the federal agency overseeing the state operation of the program does not demand perfect compliance with federal regulations. *See, Mason v. Bradley,* 789 F.Supp. 273 (N.D. Ill. 1992). Such an interpretation of *Suter* tacitly overrules *Wilder, Wright* and *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 447 (1970) and would leave litigants such as the Respondents here with no federal forum to challenge a blatant denial of services to a substantial number of eligible recipients of federal programs.

All of the cases in which the federal courts have concluded that a 1983 cause of action does not lie to remedy an alleged violation of Title IV-D of the Social Security Act involved challenges to the respective states' operations of their Title IV-D plans, not challenges to the legality of the state plans. *See, Wehunt v. Ledbetter,* 875 F.2d 1558 (11th Cir. 1989), *cert. denied,* 494 U.S. 1027 (1990); *Carelli v. Howser,* 923 F.2d 1208 (6th Cir. 1991);

*Mason v. Bradley,* 789 F.Supp. 273 (N.D. Ill. 1993). Of those cases only the *Wehunt* court concluded that Title IV-D did not create privately-enforceable rights in the recipients of Title IV-D services. Other Courts, in rejecting the *Wehunt* analysis, have concluded that Title IV-D did intend to benefit persons such as the Respondents and it therefore could be enforced through a 1983 action. *Carelli, supra; Behunin v. Jefferson County Department of Social Services,* 744 F.Supp. 255 (D. Colo. 1990); *Beasley v. Harris,* 671 F.Supp. 911 (D. Conn. 1987).

The *Wehunt* Court's analysis does differ from the approach taken by the Court below in that the Eighth Circuit did conclude that Title IV-D does vest private litigants with rights that can be enforced under 1983. *Wehunt* holds that Title IV-D was not enacted to benefit persons such as the Respondents here. *Wehunt* was decided before this Court's decisions in *Wilder* and *Suter* and the Eleventh Circuit therefore did not have the benefit of the analytical framework set out in those cases to assess the availability of a 1983 remedy for a Title IV-D violation. Indeed, *Wehunt* has proved to be an anomaly with no other federal court embracing its logic under the *Wilder* and *Suter* analysis. Because *Wehunt* has been largely discredited by post-*Wilder* and *Suter* decisions and because the unique facts in this case distinguish it from the other Title IV-D challenges the granting of certiorari would not enlighten inferior courts confronted with challenges to the manner in which States operate their Title IV-D programs.

The *Wehunt* Court's conclusion that Title IV-D was intended to offset the costs of welfare benefits and not to benefit AFDC families is also patently contrary to the

statute itself. If the Petitioners had assisted the Respondents in obtaining paternity adjudications and support orders their families would not only have reaped the benefits from the establishment of paternity, which for Indian children may be the only way a child can be enrolled with an Indian Tribe, but would have supplemented their meager incomes with an extra $50.00 per month. *See*, 42 U.S.C. § 657(B)(1). Even $50.00 per month would be of great assistance to the Respondents some of whom reside in the poorest counties in the United States.

Finally, the Petitioners' contention that the Eighth Circuit's opinion below has opened the federal courthouse doors to every litigant dissatisfied with the manner in which a State collects her child support is a serious distortion of the Court's holding. This is not a case where a single, disgruntled litigant objects to the state's implementation of an otherwise valid plan to deliver child support services to state residents. *See, e.g., Clifton v. Schaefer*, 969 F.2d 278 (7th Cir. 1992). Instead, the Petitioners' state plan excluded the delivery of services to a large percentage of the South Dakota population in clear and undisputed violation of the federal statute. The Federal Secretary was in no position to remedy this violation of the law because her policies, at the time, transgressed the statute. In such a case the only possible remedy to correct both a state and federal misapplication of federal law is a 1983 action with the *Suter* case as an appropriate benchmark for determining whether such a cause of action lies. A review of the post-*Suter* litigation reveals that the federal courts are already stringently applying *Suter* and further clarification would be unwarranted at this time.

## CONCLUSION

For the foregoing reasons this Court should deny the petition for a writ of certiorari. The grant of the writ would not tend to resolve the dispute below because of the federal Secretary's absence from this litigation. Additionally, because this case involves a challenge to a State's plan for providing Title IV-D services to its residents, instead of a challenge to the manner in which a plan is implemented, the decision below does not conflict with other Circuit and district court opinions discussing the availability of a 1983 remedy to redress Title IV-D violations.

Respectfully submitted

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